SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1965

No. 246

MICHAEL VETERE,

Petitioner,

v.

JAMES E. ALLEN, JR., Commissioner of Education of the State of New York; BOARD OF EDUCATION OF UNION FREE SCHOOL DISTRICT NO. 12 OF THE TOWN OF HEMPSTEAD, NEW YORK; PATRICIA ANN MITCHELL, ET AL.; and THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE,

Respondents.

LEWIS HUMMEL and HERMAN ABRAMS,

Petitioners,

v.

JAMES E. ALLEN, JR., Commissioner of Education of the State of New York, and BOARD OF EDUCATION OF UNION FREE SCHOOL DISTRICT NO. 12 OF THE TOWN OF HEMPSTEAD, NEW YORK,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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LEWIS HUMMEL and HERMAN ABRAMS,

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v.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Petitioners Michael Vetere, Lewis F. Hummel and Herman Abrams, respectfully pray that a writ of certiorari issue to review an order of the Court of Appeals of the State of New York, entered on April 9, 1965.

Opinions Below

The majority opinion of the New York State Court of Appeals (reported at 15 N. Y. 2d 259, 206 N. E. 2d 174), is reprinted in Appendix A hereto at pages 27-29. The dissenting opinion of Judge Van Voorhis appears in Appendix A at pages 29-33. The dissenting opinion of Judge Scileppi appears in Appendix A at pages 33-38. The judgment of the New York Court of Appeals was entered on April 9, 1965 and is reprinted as Appendix B.

The respective opinions of the Appellate Division, Third Department (reported at 21 A. D. 2d 561, 251 N. Y. S. 2d 480) and of Special Term, Albany County (reported at 41 Misc. 2d 200, 245 N. Y. S. 2d 682) appear in the record at pages 12 and 38, respectively.

Jurisdiction

The judgment of the New York State Court of Appeals was entered on April 9, 1965. The jurisdiction of this Court is invoked under 28 U. S. C. Section 1257(3), since the State of New York has deprived petitioners of the rights, privileges and immunities provided by U. S. Constitution, Amendment XIV and 42 U. S. Code Sections 2000c, *et seq.*

Question Presented

Are the petitioners deprived of equal protection of the laws, or of liberty without due process of law, by a directive of the New York State Commissioner of Education, which

- –excludes their children from their neighborhood schools which they would otherwise attend, and
- –requires them to transfer to more distant schools which they would not otherwise attend,

solely to achieve a racial mixture whereby no school may have "... 50 per cent or more negro pupils enrolled"?

Statutes Involved

U. S. Constitution, Amendment XIV.

* * *

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

42 U. S. Code Section 2000C (Civil Rights Act of 1964, Section 401).

"As used in this title—

* * *

(b). 'Desegregation' means the assignment of students to public schools and within such schools without regard to their race, color, religion, or national origin, but 'desegregation' shall not mean the assignment of students to public schools in order to overcome racial imbalance."[1]

Statement

School District No. 12

Union Free School District No. 12 of the Town of Hempstead, New York, contains three elementary schools: the Woodfield Road School, the Davison Avenue School and the Lindner Place School (56)[2].

For some years these schools have admitted pupils form kindergarten through grade five, and each school has for many years been assigned an "attendance area" within the District. Such attendance areas have been selected

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[1] The present actions were commenced in 1963, prior to enactment of the Civil Rights Act of 1964 (Record, p. 49). Such Act was promptly raised during the appeals below (Appendix A, p. 23, *infra*).

[2] Unless otherwise indicated, parenthetical references are to page numbers in the certified record of proceedings below.

by the local Board of Education on the basis of geographical proximity of pupils' residences; availability of school facilities; safety and transportation considerations and other like educational factors; but without regard to race, color, creed or national origin of the pupils (56).

During a period of approximately five years prior to the commencement of these proceedings, increasing numbers of Negroes have moved into the portion of the District surrounding, and therefore served by, the Woodfield Road School. As a result of this wholly fortuitous occurrence, and not by reason of any act of the Board of Education, the Woodfield Road School now has a majority of Negro pupils (56). The percentage Negro enrollment at Woodfield Road is about 75%, and is about 14% at the other two schools (91, 92).

The Commissioner's Mandate for Racial Quotas

On June 14, 1963, the Commissioner of Education of the State of New York (herein the "Commissioner") issued a directive to all local school administrators (140). In this directive the Commissioner defined a "racially imbalanced" school as ". . . one having 50 per cent or more negro pupils enrolled" (143), and stated that

> ". . . there must be corrective action in each community where such imbalance exists" (142).

The Directive further stated that racial "imbalance" in the schools

> ". . . must . . . be eliminated from the schools of New York State" (142).

The Commissioner's directive further stated that ". . . it is the responsibility of local school authorities in such communities to develop and implement the necessary plans" (142). The directive went on to direct that each school district submit a report ". . . indicating the situation in

your district with regard to any problem of racial imbalance", as well as the plans of each district for future action regarding the "imbalance" (142, 143).

Although it has not yet been revealed how the Commissioner arrived at the fifty percent quota for determining racial "balance", he concedes that in November, 1961, he caused to be made a racial census, showing every district in New York State where racial "imbalance" existed (143).

The Present Controversy

In November, 1962, the Commissioner heard an administrative appeal by certain parents from a decision of the Board of Education of District 12 (herein the "Board") (62). The gist of this appeal was that the Board had declined to transfer the children of these parents from the Woodfield Road School into other schools [outside of the normal areas of residence and attendance] having a lower percentage of Negro students; and that such children were thereby deprived of equal educational opportunity (62, 63). The complainants did not contend, nor was any finding ever made, that their educational opportunity was lacking or unequal in any respect other than that of "racial imbalance". Rather, the essence of their complaint was

> ". . . that the student body of the Woodfield Road School is composed predominantly of Negro pupils and that the educational opportunities afforded in that school are therefore inferior" (88).

Upon receiving the appeal of the complainants [which was prosecuted before the Commissioner by the NAACP],[3] (162), the Commissioner referred the matter to a three-man "advisory committee" for findings of fact (88). The

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[3] The National Association for the Advancement of Colored People.

members of this committee were Kenneth B. Clark, Judah Cahn and John H. Fischer (88).

Of the three members of this committee, two were and are active as national officials in the NAACP, the party prosecuting the appeal. The NAACP entered the proceedings below as *amicus curiae* (10, 160).

Kenneth B. Clark is active as "social science consultant" to the Legal and Educational Division of the NAACP (Who's Who in America, 1962-1963) and has regularly appeared as a partisan witness for the NAACP in racial "balance" cases. Trial record, *Blocker* v. *Manhasset School Board,* 226 F. Supp. 208 (E. D. N. Y. 1964) page 1693.

Judah Cahn is a vice president of the NAACP (Who's Who in the East, 1961).

The dates of the foregoing references make it clear that at the time the Comissioner referred this matter to the committee, he knew of the partisan affiliations of Messrs. Clark and Cahn.

The Commissioner's Findings

The Commissioner's committee found, among other things, that

> "If racial difference were not a fact of life in this community, the attendance areas as defined could be cited as an excellent example of administrative planning. They are of suitable size, as compact as possible, and place the majority of children within convenient walking distance of their schools. There are programs of remedial work and enrichment for the Woodfield Road pupils at all grade levels" (93).
>
> * * *
>
> "The actions of the Board should not be termed arbitrary. In 1961 in response to the community situation the Board transferred students from Woodfield Road to the other two schools. These attempts although helpful have not solved the basic problem

which is the existence of a racially imbalanced school" (93, 94).

* * *

"In our visits to each of the schools we found no evidence of different educational standards. The quality of teaching appeared comparable. Pupil work was exhibited in the same way and the interest of pupils and teachers in class work was uniformly good (95).

* * *

"Class size at Woodfield Road is slightly lower than at the other schools. There is no overcrowding. With the rooms made available by moving all 6th grades to the central school, extra space will be available for special uses (96).

* * *

"No evidence was found of any deliberate action by the Board to create artificial school zones in an attempt to contain the Negro school population. On the contrary the only change that has been made in long established boundaries resulted in the transfer of Negro pupils from Woodfield Road to the other two schools. Each school has its own character but none could properly be called a poor school in any sense. Although as noted above the Lindner Place school is the newest building and somewhat more pleasing architecturally, the Davison Avenue and Woodfield Road Schools were constructed at about the same time, and are comparable buildings. Each, however, reflects in its enrollment the residential pattern of the neighborhood. This fact has created the racial imbalance in the Woodfield Road School (96, 97).

"Your Committee believes that in the entire complaint there is one basic and real issue. *Is the Woodfield Road School a racially imbalanced school? If it is, then it follows that the social psychological and educational problems which are ordinarily found in segregated or racially imbalanced schools are present in this situation.* Your Committee has found that the Woodfield Road School is in fact a racially imbalanced school" (97). (Italics supplied).

The Committee did not make, and did not purport to make, any finding of fact as to whether, in this particular case, any adverse "psychological and educational problems" existed by reason of the so-called imbalance.

The findings of the Committee were confirmed by the Commissioner himself (65).

The Committee proposed four alternative plans for the elimination of racial "imbalance" within the school district. The first of these would require that the Board of Education eliminate completely the attendance zones, and

> "(1) Reorganize the attendance areas of the District so that all pupils from kindergarten to grade 3 inclusive, will attend either Davison Avenue or the Lindner Place elementary school; all pupils in grades 4 or 5 will attend the Woodfield Road School" (101, 102).

The Committee concedes that under this proposal, "more pupils than at present will need to cross Ocean Avenue, a main street in the community;" and that children will travel a longer distance to school than they now do (103).

The Committee did not specifically endorse any one of its four alternative proposals, nor did it find that any one of such proposals would best serve the overall interests of the pupils within the district. The Committee did state, however, that the proposal quoted above would "* * * do most to satisfy the current complaints of the petitions" (105).

The Committee also considered and reported on the possibility of establishing a policy of "open enrollment" for the entire elementary system, whereby transfers would not be compulsory, but would be available to children of all races, on a voluntary basis (104). The Committee opined, however, that this alternative would be disadvantageous, in that

> "Most parents of white pupils would be unlikely to choose the option to transfer to Woodfield Road.

> Very few parents of Negro pupils ordinarily use an 'open enrollment' option'' (104, 105).

By a directive dated June 17, 1963, the Commissioner directed the Board of Education to adopt the above quoted proposal (62-73). The directive of the Commissioner, in six and one-half pages, makes seven express references to racial ''balance'' or ''imbalance'' (63-70). No mention is made of any other educational factors.

Although the Commissioner directed the Board of Education to adopt the rezoning plan suggested by his Committee, he conceded that

> ''(3) The Board of education has not been arbitrary in establishing or in refusing to change school attendance lines * * * (65); and
>
> ''(4) The educational standards at the Woodfield Road School are not below those of the other two elementary schools'', (65).

Subsequently, the Commissioner denied motions of the Board of Education to reopen the hearings (78).

Reasons for Granting the Writ

Is an American free to proceed through this life, and to attain the fruits of our society, unfettered and unencumbered by considerations of the race, color, religion or ethnic origin of himself or his neighbors?

Or, is an American to be accorded a particular beneficial or detrimental treatment before the law, dependent upon whether he is of one race or another, one religion or another, one national origin or another, or from a neighborhood consisting of one ethnic admixture or another?

This is one of the most crucial, if not the most crucial, of the Constitutional issues confronting the American people today.

The Commissioner of Education of New York State has answered this question with a decree requiring that every school district in New York State must achieve a racial "balance" in the schools (142). He defines racial "imbalance" as existing in any school which has " . . . 50 per cent or more negro pupils enrolled." (143).

The effect of this directive has been to destroy the value of neighborhood schools for those citizens of New York State, of whatever race, who are unfortunate enough to live in neighborhoods whose racial composition is not satisfactory to the Commissioner. Persons living in such neighborhoods are accorded a special, unequal treatment, in that their children are subjected to the hazards of being transferred from their existing neighborhood schools to more distant schools. This is required of them solely because of their race.

The extreme nature and result of the Commissioner's directive is depicted in Mayer, *Close to Midnight For the New York Schools*, New York Times Magazine, May 2, 1965, p. 34:

> "Public confidence in the school system is fearfully low and dropping. White children are leaving the city public schools at a rate of 40,000 a year (and the Allen Report, in a little-noticed passage, predicted by percentages a rate of 60,000 a year in the near future). Of the leaders of the school system itself—the nine-member Board of Education and the 20-odd deputy and associate superintendents—only a handful have children who attend or ever did attend a New York public school. Even worse, the Negro middle class has almost entirely disappeared. Of the Negro leaders of the integration drive, the Wilkenses and Clarks, the Farmers and Joneses and Rustins, the Youngs and Galamisons, not one has or has had a child in a New York public school."

I. Pupil assignments founded upon racial considerations are repugnant to the requirements of equal protection and due process.

This Court has held that assignments of public school pupils, solely on the basis of their race, amounts to a deprivation of equal protection of the laws.

> *Brown* v. *Board of Education*, 347 U. S. 483, 74 S. Ct. 686, 98 L. Ed. 583 (1954).

Similarly, this Court has held that pupil assignment predicated upon racial considerations constitutes an unconstitutional deprivation of due process of law.

> *Bolling* v. *Sharpe*, 347 U. S. 497, 74 S. Ct. 693, 98 L. Ed. 591 (1954). ["Classifications based solely upon race must be scrutizinzed with particular care, since they are contrary to our traditions and hence constitutionally suspect."]

See also, *Goss* v. *Board of Education of Knoxville*, 373 U. S. 683 at 684, 83 S. Ct. 1405, 10 L. Ed. 2d 632 (1963).

> [" . . .[W]e note that if the transfer provisions were made available to all students regardless of their race and regardless as well of the racial composition of the school to which they requested transfer, we would have an entirely different case. Pupils could then at their option (or that of their parents) choose entirely free of any imposed racial considerations to remain in the school of their zone, or to transfer to another.
>
> • • •
>
> "Classifications based on race for purposes of transfer between public schools, as here, violate the Equal Protection clause of the Fourteenth Amendment. As the Court said in [an earlier case] • • • 'racial classifications are obviously irrelevant and invidious' "].

II. Conflicting State and Federal decisions on the question of desired racial quotas makes a resolution of the present case of vital importance.

American life today is rife with conflicting contentions, by majority—and minority—groups, to the effect that restrictions should be imposed upon the one, or that special privileges should be accorded to the other, on the basis of racial or ethnic considerations.

It is essential in this area of our national life that the state adhere strictly to the principles of objective constitutional neutrality.

To subject our Constitution on the one hand to the demands of segregationists, who seek a compulsory separation of the races; or, on the other hand, to the demands of those who seek an across-the-board system of racial quotas, is in each instance to surrender the rule of objective laws to that of subjective men.

This Court, and some lower courts, have consistently recognized that the concept of compulsory racial quotas is repugnant to the overriding interest of constitutional neutrality.

> *Hughes* v. *California*, 339 U. S. 460, 94 L. Ed. 985, 70 S. Ct. 718 (1950) [petitioners held not entitled to picket, to secure compliance with demand that store employees be in proportion to the racial origin of its customers].
>
> *Downs* v. *Kansas City Board of Education*, 336 F. 2d 988 (10th Cir. 1964), *cert. den.* 380 U. S. 914, 85 S. Ct. 898, 13 L. Ed. 2d 800 (1965).
>
> See also *Collins* v. *Walker*, 329 F. 2d 100, 105, (5th Cir. 1964) *cert. den.* 379 U. S. 901, 85 S. Ct. 189 (1964) [deliberate inclusion of Negroes in a grand jury held as much a deprivation of equal protection as their deliberate exclusion].

Swain v. *Alabama*, 380 U. S. 202, 85 S. Ct. 824, 13 L. Ed. 2d 759 (1965) [defendant, convicted of felony, held not entitled of right to a racially balanced jury].

Wright v. *Rockefeller*, 376 U. S. 52, 84 S. Ct. 603, 11 L. Ed. 2d 512, *reh. den.* 376 U. S. 959, 84 S. Ct. 964 (1964) [petitioners held not entitled to a racially balanced Congressional election district].

However, the Federal Courts of Appeals, as well as State courts of last resort, have been unable to agree even upon the basic concepts which should apply in this area of legal controversy. Consequently, the law is unsettled, and should be reconciled.

Bell v. *School City of Gary, Indiana*, 213 F. Supp. 819, *aff'd* 324 F. 2d 209 (7th Cir. 1963), *cert. den.* 84 S. Ct. 1223, 377 U. S. 924, 12 L. Ed. 2d 216 (1964) [petitioners held not entitled of right to racially "balanced" public schools].

Morean v. *Board of Education of Montclair*, 42 N. J. 237, 200 A. 2d 97 (1964) [imposition of racial balance upheld].

Jackson v. *Pasadena*, 31 Cal. Rept. 606, 382 P. 2d 878 (1963) [petitioners held entitled to racially balanced schools].

Taylor v. *Board of Education of New Rochelle*, 191 F. Supp. 181, *aff'd* 294 F. 2d 36 (2d Cir. 1961) *cert. den.* 368 U. S. 940, 82 S. Ct. 382, 7 L. Ed. 2d 339 (1961) [racial "imbalance" in public schools held a deprivation of equal protection].

Rippy v. *Borders*, 250 F. 2d 690 (5th Cir. 1957) [petitioners held not entitled to racially "balanced" schools].

III. The fact that the Commissioner's action is authorized by State law does not dispose of his unconstitutional conduct.

The majority opinion of the Court of Appeals holds that the court cannot interfere with the Commissioner's administrative determination because he has the power to make it under State law. The majority opinion makes no reference to the underlying Constitutional problems.

This Court has made clear the rule that administrative actions of school officials, even if otherwise proper are nevertheless unconstitutional if founded upon racial considerations.

> *Griffin* v. *County School Board of Prince Edward County*, 377 U. S. 218, 12 L. Ed. 2d 256, 84 S. Ct. 1226 (1964) ["Whatever nonracial grounds might support a State's allowing a county to abandon public schools, the object must be a constitutional one, and grounds of race . . . do not qualify as constitutional"].

IV. The Commissioner's determination is founded upon the views of one panel of "experts", on a question as to which "experts" differ. To allow racial assignments of pupils on such precarious foundations is to subject pupils to an unconstitutional standard of conduct.

The determination of the Commissioner (106-116) and the committee report on which it is based (88-105) are founded upon the "expert" presupposition that a racial "imbalance" in the schools, for whatever reason existing, justifies resort to racial transfer of pupils.

On this question, the views of learned educators, psychologists and sociologists embrace a wide range of opinions. The views of some (A) would, if extended, require the compulsory imposition of racial quotas to insure congregation of the races. The views of others, (B) equally learned in the academic sense, would if extended require a compulsory separation of the races. Still others (C) adopt the view that race should not be a factor in pupil assignment.

(A)

Clark, Kenneth B. and Clark, Mamie, 1952. "Racial Identification and Preference in Negro Children", in *Readings in Social Psychology,* Henry Holt and Co. pp. 551-560 (1952).

Clark, Kenneth B.: "Segregation as a Factor in the Racial Identification of Negro Pre-School Children: A Preliminary Report;" Journal of Exper. Education, Vol. VIII, No. 2 (1939).

Lundberg, George A. "Selective Association Among Ethnic Groups in a High School Population." *American Sociological Review,* Vol. 17 No. 1, pp. 23-25 (1952).

Goodman, Mary E. "Evidence Concerning the Genesis of Interracial Attitudes" *American Anthropologist,* Vol. 48, No. 4, pp. 624-630 (1946).

(B)

Hooton, *Up From the Ape* (1946).

Coon, *The Origin of Races* (1962).

Hall, "Zoological Subspecies of Man." *The Mankind Quarterly* (October, 1960).

Gordon, "Amentai in East Africa," 25 *Eugenics Review* (1934).

Pearl, "Weight of the Negro Brain", *Science* (November, 1934).

(C)

Conant, James Bryant, *Slums and Suburbs* (1961), pp. 27-29.

Handlin, Oscar, *Fire-Bell in the Night* (1964), pp. 56-58.

To subject the legal rights and immunities of pupils to the subjective views of such "experts", which range all the way from one extreme to another, in one time or another, is to abandon objective legal standards.

The proponents of compulsory racial quotas, like Sir Thomas More's Roper,[4] would "cut down every law in England" to destroy what they imagine to be the Devil. But when the whole forest of laws are cut down, and the same Devil lawlessness turns upon them, where will they find their refuge?

Today our social psychologists—at least the leaders of the discipine—are liberal and egalitarian in basic approach.

Suppose, in view of this fact, this Court is willing to leave the question of racial assignment in the hands of such men. Suppose further, that with a change of sociopolitical climate, the leaders of the discipline change—from egalitarian to racist.

What then will be the state of our Constitutional rights?

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[4] See Mendelson, *Felix Frankfurter: A Tribute* (1964), p. 19.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Appendix A—Decision of the Court Below

In the Matter of MICHAEL VETERE, Individually and as Parent and Natural Guardian of ANITA VETERE, an Infant, Appellant, v. JAMES E. ALLEN, JR., as Commissioner of Education of the State of New York, et al., Respondents.

In the Matter of LEWIS HUMMEL et al., Individually and as Parents and Natural Guardians of SALLY A. HUMMEL and Another, Infants, Appellants, v. JAMES E. ALLEN, JR., as Commissioner of Education of the State of New York, Respondent, and BOARD OF EDUCATION OF UNION FREE SCHOOL DISTRICT NO. 12 OF THE TOWN OF HEMPSTEAD, NEW YORK, Appellant.

Argued November 16, 1964; reargued February 11, 1965; decided March 18, 1965.

Schools—segregation—courts have no power to review directive of State Commissioner of Education requiring local board of education to correct racial imbalance in its schools; such determination by Commissioner not arbitrary or illegal (Education Law, §§ 207, 301, 305, 310).

The Board of Regents, under authority of section 207 of the Education Law, has declared racially imbalanced schools to be educationally inadequate. The State Commissioner of Education, under authority of sections 301 and 305 of the Education Law, has implemented this policy by directing the local boards of education to take steps to eliminate racial imbalance. Such a specific directive, issued by the Commissioner after hearing an appeal from a determination of a board of education, is final and is not reviewable by the courts (Education Law, § 310), absent a showing of pure arbitrariness. The Commissioner may substitute his judgment for that of the local board even when the determination of the local board is not arbitrary. The courts have no power to evaluate the sociological, psychological and educational assumptions relied on by the Commissioner. The Legislature has endowed the Board of Regents and the

Commissioner with all but absolute power to make public policy and administrative decisions in the field of education. The Commissioner's determination was not arbitrary or illegal; hence the Appellate Division properly reversed so much of a judgment of Special Term as annulled the determination of the Commissioner, and dismissed the petition to review the Commissioner's determination.

Matter of Vetere v. *Allen*, 21 A D 2d 561, affirmed.

APPEAL from an order of the Appellate Division of the Supreme Court in the Third Judicial Department, entered August 4, 1964, which modified, on the law and the facts and in the exercise of discretion, and, as modified, affirmed an order and judgment of the Supreme Court at Special Term (ISADORE BOOKSTEIN, J.; opinion 41 Misc. 2d 200), entered in Albany County in a proceeding under article 78 of CPLR, adjudging that the order of the Commissioner of Education directing the Board of Education of Union Free School District No. 12 of the Town of Hempstead to reorganize its attendance areas of the district should be annulled. By the modification the Appellate Division reversed so much of the order as annulled the determination of the Commissioner of Education and as denied a motion of said Commissioner to dismiss the petition.

Mason L. Hampton, Jr., C. William Gaylor and *H. Paul King* for petitioners-appellants. I. The Commissioner exceeded his judicial powers in overruling the board's pupil assignment plan, which he conceded was "not arbitrary" and an "excellent example of administrative planning." (*Matter of Board of Educ. of Cent. School Dist. No. 1, Town of Ramapo*, 65 N. Y. St. Dept. Rep. 106; *Matter of Board of Educ. of School Dist. No. 1, Vil. of Hempstead*, 70 N. Y. St. Dept. Rep. 108; *Matter of Bell*, 77 N. Y. St. Dept. Rep. 37; *Matter of Dileo*, 74 N. Y. St. Dept. Rep. 83; *Blocker* v. *Board of Educ. of Manhasset*, N. Y., 226 F. Supp. 208.) II. The Commissioner was wholly arbitrary in acting upon the assumption, not supported by facts in the

record before him, that racial "imbalance", for whatever reason existing, must be eliminated. (*Matter of Rosenbluth* v. *Finkelstein,* 300 N. Y. 402; *Matter of Stammer* v. *Board of Regents of Univ. State of N. Y.,* 287 N. Y. 359; *Matter of Kilgus* v. *Board of Estimate of City of N. Y.,* 308 N. Y. 620; *Matter of Macy & Co.* v. *New York State Labor Relations Bd.,* 192 Misc. 697, 275 App. Div. 665; *Taylor* v. *Board of Educ. of New Rochelle,* 191 F. Supp. 181, 294 F. 2d 36, 368 U. S. 940; *Gomillion* v. *Lightfoot,* 364 U. S. 339). III. The Commissioner's determination, which requires children in a certain neighborhood to leave their neighborhood school and transfer to a more distant school in order to achieve racial "balance", violates section 3201 of the Education Law. (*Matter of Balaban* v. *Rubin,* 20 A D 2d 438, 14 N Y 2d 193; *Matter of Strippoli* v. *Bickal,* 42 Misc 2d 475, 21 A D 2d 365). IV. The petitions state causes of action. (*Latham* v. *Father Divine,* 299 N. Y. 22; *Matter of Fabricius* v. *Graves,* 254 App. Div. 19, 913; *Matter of Ross* v. *Wilson,* 284 App. Div. 522, 308 N. Y. 605; *Matter of Hiscox* v. *Levine,* 31 Misc 2d 151; *Bareham* v. *Rochester,* 221 App. Div. 36, 246 N. Y. 140.) V. The Commissioner's requirement that pupils be transferred away from their neighborhood because of racial considerations violates constitutional guarantees of equal protection and due process. (*Brown* v. *Board of Educ.,* 347 U. S. 483; *Bolling* v. *Sharpe,* 347 U. S. 497; *Goss* v. *Board of Educ.,* 373 U. S. 683; *Cooper* v. *Aaron,* 358 U. S. 1; *Taylor* v. *Board of Educ. of New Rochelle,* 191 F. Supp. 181, 294 F. 2d 36; *Webb* v. *Board of Educ. of City of Chicago,* 223 F. Supp. 466.) VI. Administrative power to define attendance area lines inheres in the local boards of education and has not been granted to the Commissioner. (*People* v. *Dethloff,* 283 N. Y. 309; *Matter of De Angelis* v. *Laino,* 235 App. Div. 390, 260 N. Y. 661; *Lawrence Constr. Corp.* v. *State of New York,* 293 N. Y. 634; *Lantry* v. *Mede,* 127 App. Div. 557, 194 N. Y. 544.) VII. Lacking administrative power to determine attendance area zones, the

Commissioner may not usurp such power under the guise of quasi-judicial "review". (*Matter of Board of Educ. of City of N. Y.* v. *Allen*, 6 N Y 2d 127; *People ex rel. Board of Educ.* v. *Graves*, 243 N. Y. 204; *Matter of La Fontaine Props.* v. *McGoldrick*, 200 Misc. 518; *Matter of Burstyn, Inc.* v. *Wilson*, 278 App. Div. 253, 303 N. Y. 242, 343 U. S. 495; *Matter of Lewisboro-Vista Civic Assn.*, 73 N. Y. St. Dept. Rep. 178; *Matter of New York State Comm. Against Discrimination* v. *Pelham Hall Apts.*, 10 Misc 2d 346; *Bell* v. *School City of Gary, Ind.*, 213 F. Supp. 819, 324 F. 2d 209.) VIII. The power sought to be asserted by the Commissioner would necessitate the destruction of the private and religious school systems in the State of New York. IX. In the present case, the Commissioner failed to make factual inquiries or findings as to whether, in the present case, the so-called "imbalance" is the cause of any impairment of educational opportunity. Such conduct violates the fundamental rule that administrative determinations must be founded upon findings of fact. Otherwise they are capricious and arbitrary. (*Matter of New York State Guernsey Breeders Co-op* v. *Noyes*, 284 N. Y. 197; *Matter of Land Purch Corp. of America* v. *Grunewald*, 20 Misc 2d 175.)

Thomas L. Driscoll for Board of Education of Union Free School District No. 12, Town of Hempstead, New York, appellant. I. The Commissioner's decision and order is illegal and therefore arbitrary, capricious, and in defiance of the constitutional rights of petitioners in this proceeding and their children. (*Matter of Balaban* v. *Rubin*, 20 A D 2d 438, 14 N Y 2d 193.) II. The law of all of the cited cases and of all of the cases which have dealt with the question of imbalance is completely in accord with this appellant's contention. (*Bell* v. *School City of Gary, Ind.*, 324 F. 2d 209; *Brown* v. *Board of Educ.*, 347 U. S. 483, 349 U. S. 294; *Brown* v. *Board of Educ. of Topeka*, 139 F. Supp. 468; *Briggs* v. *Elliott*, 132 F. Supp. 776; *School Bd. of City of Charlottesville, Va.* v. *Allen*, 240 F. 2d 59; *Blocker* v.

Board of Educ. of Manhasset, N. Y., 226 F. Supp. 208; *Taylor* v. *Board of Educ. of New Rochelle*, 191 F. Supp. 181; *Henry* v. *Godsell*, 165 F. Supp. 87; *Matter of Bell*, 77 N. Y. St. Dept. Rep. 37; *Matter of Board of Educ. of School Dist. No. 1, Vil. of Hempstead*, 70 N. Y. St. Dept. Rep. 108.) III. The Commissioner's fact-finding committee's findings adopted by the Commissioner sustain the action and contention of this appellant. IV. The report and findings of the committee and the Commissioner clearly show that appellant Board of Education has acted reasonably and not in an arbitrary manner. V. The case of *Matter of Balaban* v. *Rubin* (20 A D 2d 438, 14 N. Y. 2d 193), cited by respondents, does not sustain the contentions of respondent Commissioner and others. VI. The Negro children attending the Woodfield Road School achieve just as well as those attending the other two grade schools in the district. VII. The recent Civil Rights Law provisions compel an annulment of the Commissioner's decision and order. VIII. The power to control the assignment of pupils to the schools in the district and determine area zones lies wholly within the local board of education. IX. The amendment of 1956 to section 1709 of the Education Law by the addition of subdivision 33 puts the absolute power in the local board of education to have the management of the schools in the district. X. Section 310 of the Education Law would have no effect in the case at bar. (*Matter of Bottenfield*, 77 N. Y. St. Dept. Rep. 25.) XI. The right of appeal to the Commissioner of Education provided in section 310 of the Education Law is not exclusive and does not oust the courts of jurisdiction in cases calling for the interpretation of a statute affecting a valuable right. (*Matter of McMaster* v. *Owens*, 192 Misc. 687; *Finley* v. *Spaulding*, 192 Misc. 860; *Matter of O'Connor* v. *Emerson*, 196 App. Div. 807.)

Charles A. Brind, John P. Jehu, Elizabeth M. Eastman, George B. Farrington and *Louis H. J. Welch* for Commis-

sioner of Education, respondent. I. The decision of the Commissioner is not "purely arbitrary". (*Brown* v. *Board of Educ.*, 347 U. S. 483; *Matter of Balaban* v. *Rubin*, 14 N Y 2d 193; *Matter of Strippoli* v. *Bickal*, 42 Misc. 2d 475, 21 A D 2d 365; *Matter of Addabbo* v. *Donovan*, 43 Misc. 2d 621; *Matter of Schnepp* v. *Donovan*, 43 Misc. 2d 917; *Blocker* v. *Board of Educ. of Manhasset, N. Y.*, 226 F. Supp. 208.) II. The decision of the Commissioner rendered under section 310 of the Education Law is final and conclusive and not subject to review in any court or place whatever. (*Matter of Board of Educ. of City of N. Y.* v. *Allen*, 6 N Y 2d 127; *Matter of Board of Educ. of Cent. School Dist. No. 12 of Town of Virgil* v. *Allen*, 14 A D 2d 429; *Matter of Cochran* v. *Levy*, 175 Misc. 666, 263 App. Div. 921; *Matter of Board of Educ. of Bethlehem Union Free School Dist.* v. *Wilson*, 196 Misc. 239, 277 App. Div. 809, 303 N. Y. 107; *Matter of Board of Educ. of Union Free School Dist. No. 1 of Town of Neversink* v. *Wilson*, 282 App. Div. 821, 847; *Matter of Soergel* v. *Allen*, 10 A D 2d 767, 9 N Y 2d 633; *Matter of Board of Educ. of Union Free School Dist. No. 3* v. *Allen*, 6 A D 2d 316, 6 N Y 2d 871, 6 N Y 2d 983, 361 U. S. 535; *Matter of Clark* v. *Allen*, 7 A D 2d 144, 8 A D 2d 665; *Gardner* v. *Ginther*, 232 App. Div. 296; *Lair* v. *Grant*, 137 Misc. 470; *Adriaansen* v. *Board of Educ. of Union Free School Dist. No. 1, Town of Marion*, 222 App. Div. 320; *Matter of District No. 2 of Town of Marion*, 31 N. Y. St. Dept. Rep. 426; *Matter of Common School Dist. No. 2 of Town of Waverly*, 33 N. Y. St. Dept. Rep. 53; *Matter of District No. 9 of Town of Kent*, 38 N. Y. St. Dept. Rep. 625; *Matter of District No. 15, Town of Esopus*, 71 N. Y. St. Dept. Rep. 139.) III. The statute itself authorizes and requires the Commissioner of Education to make such an order in a proper case. (*Matter of Szkolnik* v. *Allen*, 19 A D 2d 765; *Matter of Bowen* v. *Allen*, 1 Ed. Dept. Rep. 534, 29 Misc. 2d 35, 14 A D 2d 716, 17 A D 2d 12, 13 N Y 2d 663; *Bullock* v.

Cooley, 225 N. Y. 566; *Barringer* v. *Powell*, 230 N. Y. 37; *People ex rel. Hylan* v. *Finegan*, 227 N. Y. 219; *People ex rel. Board of Educ. of City of N. Y.* v. *Finley*, 211 N. Y. 51; *Matter of Hirshfield* v. *Cook*, 227 N. Y. 297; *People ex rel. Board of Educ.* v. *Graves*, 243 N. Y. 204; *Hutchinson* v. *Skinner*, 21 Misc. 729.) IV. The history and purpose of the statute support the power of respondent to make the order. (*Bullock* v. *Cooley*, 225 N. Y. 566; *Matter of Hirshfield* v. *Cook*, 227 N. Y. 297; *Matter of Board of Educ. of Cent. School Dist. No. 1, Town of Ramapo*, 65 N. Y. St. Dept. Rep. 106; *Matter of Board of Educ. of School Dist. No. 1, Vil. of Hempstead*, 70 N. Y. St. Dept. Rep. 108; *Matter of Board of Educ. of Union Free School Dist. No. 9, Town of Hempstead*, 71 N. Y. St. Dept. Rep. 166; *Matter of Davis*, 75 N. Y. St. Dept. Rep. 57; *Matter of Bell*, 77 N. Y. St. Dept. Rep. 37; *Matter of Taylor*, 1 Ed. Dept. Rep. 501; *Matter of Danker*, 2 Ed. Dept. Rep. 513.) V. The power here involved derives not from constitutional rights or duties of the parties, but purely and solely from the need to solve an essentially educational problem. (*Bell* v. *School City of Gary, Ind.*, 213 F. Supp. 819, 324 F. 2d 209, 377 U. S. 924; *People ex rel. Yale* v. *Eckler*, 19 Hun 609.)

Robert L. Carter, Joan Franklin and *Louis Steel* for remaining respondents. I. Boards of education have a constitutional duty to eliminate racial imbalance. (*Blocker* v. *Board of Educ. of Manhasset, N. Y.*, 226 F. Supp. 208; *Branche* v. *Board of Educ. of Town of Hempstead*, 204 F. Supp. 150; *Morean* v. *Board of Educ.*, 42 N. J. 237; *Brown* v. *Board of Educ.*, 347 U. S. 483; *Taylor* v. *Board of Educ. of New Rochelle*, 191 F. Supp. 181, 294 F. 2d 36, 368 U. S. 940; *Goss* v. *Board of Educ.*, 373 U. S. 683; *Holland* v. *Board of Public Instruction of Palm Beach County, Fla.*, 258 F. 2d 730; *Matter of Balaban* v. *Rubin*, 20 A D 2d 438, 14 N Y 2d 193; *Matter of Strippoli* v. *Bickal*, 21 A D 2d 365; *Matter of Addabbo* v. *Donovan*, 43 Misc. 2d 621; *Matter of Schnepp* v. *Donovan*, 43 Misc.

2d 917; *Ex Parte Virginia*, 100 U. S. 339.) II. Independently of the constitutional obligation to eliminate racial imbalance, the Commissioner's decision is reasonable and therefore, final and conclusive. (*Matter of Chapin* v. *Board of Educ. of City of Buffalo*, 291 N. Y. 241; *Matter of Board of Educ. of City of N. Y.* v. *Allen*, 6 N Y 2d 127.) III. The Commissioner's plan to correct racial imbalance is legal and constitutional. (*Fuller* v. *Volk*, 230 F. Supp. 25; *Board of Educ. of Waverly Community Unit School Dist. No. 6* v. *Nickell*, 410 Ill. 98.) IV. The Commissioner has power to direct a board of education to modify its pupil assignment policy to correct racial imbalance. V. The Commissioner is empowered to hear petitions of persons conceiving themselves aggrieved by the refusal of a local board to act consistently with State educational policy. (*Bullock* v. *Cooley*, 225 N. Y. 566; *Barringer* v. *Powell*, 230 N. Y. 37; *People ex rel. Board of Educ. of City of N. Y.* v. *Finley*, 211 N. Y. 51; *Matter of Board of Educ. of City of N. Y.* v. *Allen*, 6 N Y 2d 127; *Matter of Nestler* v. *Board of Examiners of Bd. of Educ. of City of N. Y.*, 192 Misc. 663; *Matter of Bomar* v. *Cole*, 177 Misc. 740; *Matter of Bowen* v. *Allen*, 17 A D 2d 12, 13 N Y 2d 663; *People ex rel. Hylan* v. *Finegan*, 227 N. Y. 219; *Matter of Delamater*, 60 N. Y. St. Dept. Rep. 17; *Matter of Beam* v. *Wilson*, 200 Misc. 183, 279 App. Div. 277; *Craig* v. *Board of Educ. of City of N. Y.*, 173 Misc. 969, 262 App. Div. 706; *Matter of Ross* v. *Wilson*, 284 App. Div. 522; *Matter of Board of Educ. of City of Oneida* v. *Tuttle*, 125 Misc. 230; *People ex rel. Yale* v. *Eckler*, 19 Hun 609; *Matter of Gable* v. *Gilbert*, 126 Misc. 185; *Matter of Belman*, 78 N. Y. St. Dept. Rep. 10; *Matter of Conlin*, 75 N. Y. St. Dept. Rep. 60.) VI. Section 311 (subd. 4) explicitly authorizes the Commissioner to compel compliance with his determinations by adopting all necessary measures. VII. Assuming the power of the board of education to determine attendance areas, this in no way negates the Commissioner's adminis-

trative control over boards in exercising such power or his authority to review and compel a variation in zoning practices.

Per Curiam. The issue posed by the petition in terms of racial balance, which balance the Commissioner now avers is essential to a sound education, is not reviewable by this court as the following quotations from opinions show. The purpose of the grant of quasi-judicial powers under section 310 of the Education Law is "to make all matters pertaining to the general school system of the state within the authority and control of the department of education and to remove the same as far as practicable and possible from controversies in the courts" (*Bullock* v. *Cooley*, 225 N. Y. 566, 576-577 [1919]). "By our state system of education protected by the Constitution and developed by much study and experience, the commissioner of education is made the practical administrative head of the system, and in his exercise of sound wisdom, as we believe, the legislature deemed it best to make him the final authority in passing on many questions bound to arise in the administration of the school system, and has provided an expeditious and simple method by which a disposition of such questions could be reached through appeal to him" (*People ex rel. Board of Educ. of City of N. Y.* v. *Finley*, 211 N. Y. 51, 57 [1914]). "In appraising the judicial nature of the act of the Commissioner of Education, it must be remembered that he combines both judicial and administrative functions. When he decides appeals where he has occasion to construe statutes, he undoubtedly acts in a judicial capacity. But in passing upon the propriety of educational policy by a particular school board or school district, he acts in a broader capacity than the courts, by reviewing at times administrative acts of discretion of which a court would refuse to take cognizance." (*Matter of Craig* v. *Board of Educ. of City of N. Y.*, 173 Misc. 969, 977, aff'd 262 App. Div. 706 [1941.] See, also, *Matter of*

Ross v. *Wilson*, 308 N. Y. 605, 617; State Commissioner's opinion of Feb. 15, 1965 in *Matter of Dixon* v. *Board of Educ. of City School Dist. of City of Buffalo*; L. 1812, ch. 242; L. 1854, ch. 97; L. 1864, ch. 555.)

This is merely a reaffirmation of a principle contained in New York law for over 130 years.

In *Easton* v. *Calendar* (11 Wend. 91, 93-94 [1833]), the court stated: "The plaintiff below was not without his remedy, 1 R. S. 487, § 110, 11; and the amendment of the law, 20th April, 1830, provides that any person conceiving himself aggrieved in consequence of any decision made by the trustees of any district in paying any teacher, or concerning any other matter under the present title (which includes the whole of the school act), may appeal to the *superintendent* of common schools, whose decision shall be final. This provision was intended for what it practically is, a cheap and expeditious mode of settling most, if not all of the difficulties and disputes arising in the course of the execution of the law. A *common law certiorari* would no doubt lie from this court to the trustees, to bring up and correct any erroneous proceeding not concluded by an adjudication of the superintendent, or in a case where his powers were inadequate to give the relief to which the party was entitled."

A recent case illustrating the Commissioner's unusual authority to overturn a local board's orders solely from the standpoint of alleged sound education policy is *Matter of Board of Educ. of City of N. Y.* v. *Allen*, 6 N. Y. 2d 127 [1959]. In that case a decision by the Commissioner that the local board's policy of requiring teachers who were former communists to identify colleagues as party members was educationally unsound was not disturbed by this court on the ground that his decision was final. In arriving at this result, the court was fully cognizant of the fact that both the Feinberg Law (Education Law, § 3022) and section 20.1 of the Board of Regents Regulations (8

NYCRR 20.1) directed boards of education to take steps to eliminate subversive elements in their school system. Here the Board of Regents under authority of section 207 of the Education Law has declared racially imbalanced schools to be educationally inadequate. The Commissioner under sections 301 and 305 of the Education Law has implemented this policy by directing local boards to take steps to eliminate racial imbalance. These decisions are final absent a showing of pure arbitrariness.

The Commissioner's decision in this case rests squarely on his finding of the inadequacy of such schools from the viewpoint of educational soundness. Since this court had decided that the Commissioner, when a similar policy judgment was made, may substitute his judgment for that of the local board even where the action of the local board was not arbitrary (*Matter of Board of Educ. of City of N. Y.* v. *Allen,* 6 N Y 2d 127 [1959], *supra*), the decision of the Commissioner in regard to racial balance is conclusive.

Disagreement with the sociological, psychological and educational assumptions relied on by the Commissioner cannot be evaluated by this court. Such arguments can only be heard in the Legislature which has endowed the Commissioner with an all but absolute power, or by the Board of Regents, who are elected by the Legislature and make public policy in the field of education.

Since we find that the determination of the Commissioner of Education is not arbitrary or illegal, the order of the Appellate Division must be affirmed.

The order of the Appellate Division should be affirmed, without costs.

Van Voorhis, J. (dissenting and voting to reverse and reinstate the order of Special Term). If, as I think, the action by the Commissioner of Education violates the Constitution of the United States and the Constitution and statutes of New York State, it is reviewable in the courts as

included in the class of conduct which is legally defined as purely arbitrary (*Matter of Ross* v. *Wilson*, 308 N. Y. 605).

By directing that all pupils from kindgergarten through grade 3 attend the Davison Avenue or Lindner Place Elementary School, and that all pupils in grades 4 and 5 attend the Woodfield Road School, after adopting the finding of his Advisory Committee that the attendance areas of these schools as defined by the Board of Education could be cited as an excellent example of administrative planning except for racial difference, the Commissioner of Education has made clear that he reversed the ruling of the Board of Education entirely in order to correct or reduce imbalance between the black and white races. The court is confronted directly with whether racial imbalance in the public schools, however it may be defined, can be overcome by admitting or excluding children from schools on account of their color. The purpose in the Commissioner's ruling is to blend the 75% Negro children in the Woodfield School with the white children in the other two elementary schools. The concentration of nonwhite children in the Woodfield School attendance area was not designed to promote racial segregation in the public schools but occurred on account of the geographical grouping of the races.

Section 3201 of the Education Law prevents a person from being excluded from any public school "on account of race, creed, color or national origin." Other statutes and constitutional provisions call for the same result (cf. U. S. Const., 14th Amdt. § 1; N. Y. Const., art. I, § 11; Education Law, § 313; Civil Rights Law, § 40; Executive Law, § 290).

The Supreme Court of the United States has held that Negroes cannot be "denied admission to schools attended by white children under laws requiring or permitting segregation according to race" without denying the equal protection of the law (*Brown* v. *Board of Educ.*, 347 U. S. 483, 488; 349 U. S. 294). That principle is contradicted by the

holding of the Appellate Division in this case. Where is the line to be drawn between allocating persons by law to schools or other institutions or facilities according to color to promote integration, and doing the same thing in order to promote segregation? Is the underlying principle not the same in either instance? Both depend on racism. If one is legally justifiable, then so is the other. There is no law which says that school children or others may be allocated according to race until there are 50% of each. If that be the guiding principle, it is honored more in the breach than in the observance.

There is an important difference between obliterating the color line by admitting a boy or girl or man or woman to a school, to employment, to a residential location or to a place of public accommodation without regard to color, and allocating people to locations, employments or facilities because of their color. The latter is what the Commissioner of Education has done in this instance. It is one thing to insist that a person should not be excluded by law from a vocation, school, theatre, hotel, restaurant or public conveyance because of color; it is quite another matter and, as it seems to me, doing the reverse, to allocate these advantages according to racial quotas or on some other proportional racial basis.

Racial questions are acute today. They occupy a great deal of public attention. At other times religious issues or questions of national origin have bulked large. Considered as a question of constitutional or statutory law, is there any more justification to billet Negroes and Caucasians here and there by law, so as to assemble them or keep them apart, than would be the case, for example, if the Commissioner of Education were to decide to do the same thing with Catholics, Protestants, Jews or any other ethnological or religious group? Could he legally determine, for instance, that there were too many Catholics and not enough Jews in a particular school, or that some Presby-

terians, Episcopalians or Swedenborgians should be added to bring their particular cultural leavens? Or, on the effect of inferiority complexes induced by the appearance of status or the lack of it, can similar measures be taken by law to avert *de facto* imbalance between the successive waves of immigrants who have come to these shores during the last century or less, each of whom has been inclined to look deprecatingly at the next most recent arrival? Could the Commissioner legally compel the alteration of school populations on the ground that there were too many of southern European extractions and not enough Celtic in a particular school, and that psychological damage was being done because the latter looked down on their fellow citizens who came more recently from southern Europe and therefore had not achieved the same distinction in America as though they had immigrated earlier in time? National origin and religion are bracketed with racial discrimination in all of these statutes and decisions. The Commissioner of Education seems to have realized this in 1956 (after the United States Supreme Court decided the *Brown* case) in a determination by him reported in 77 State Department Reports at page 37, and referred to in the opinion of Special Term (41 Misc. 2d 200, 204). There, although it was asserted that pupil attendance in one of the schools in an attendance area would be 80% Negro, the Commissioner, denying relief, said (p. 38): "Because of the incidence of location, the mere fact that the preponderance of the children who would normally attend the neighborhood school happened to be white or negro, of Polish, Irish, Scotch, Swedish, Italian or English descent or otherwise or who espouse one religion or another, does not require a board to attempt to gerrymander the lines, to assign but a certain percentage to a particular school. This would constitute as much discrimination as a gerrymandered line to accomplish the opposite effect."

This is as true now, it seems to me, as it was when the Commissioner said it in 1956. Nor does it legalize the utilization of race, religion or national origin, as a basis for allocation of students that, instead of gerrymandering the district, pupils are transferred from one school to another on the basis of race. It is true that the racial question in this country is today of outstanding importance, and that a great deal of attention and ability is being focused upon its solution. Old and deeply embedded but artificial lines of distinction are being removed; employment, housing and public accommodations as well as schools are being opened to many for whom they were long overdue. But because it is becoming recognized that for many years the Negro has been unfairly discriminated against, it does not follow that the balance can legally be redressed by quota systems, or their equivalent, which operate on the basis of distinctions based on race, religion or national origin instead of their negation.

The Supreme Court of the United States held in the *Brown* case that *de jure* segregation denies the equal protection of the law in violation of the Fourteenth Amendment to the United States Constitution. It did not relate to *de facto* segregation, nor hold that educational authorities were obliged or empowered to eliminate racial imbalance by resorting to the racial distinctions which the *Brown* decision inhibited.

I vote to reverse the order of the Appellate Division and to reinstate the order of the Special Term on the opinion at Special Term and on the dissenting opinion in *Matter of Balaban* v. *Rubin* (14 N Y 2d 193, 199).

Scileppi, J. (dissenting): Union Free School District No. 12 of the Town of Hempstead, commonly known as the Malverne-Lakeview School District, lies partially within the villages of Malverne and Lynbrook, and includes some incorporated areas of the Town of Hempstead. The

public school facilities are comprised of a senior high school, a junior high school and three elementary schools. At the present time, the junior and senior high schools accommodate all children in grades 6-12 in racially balanced classes. Thus, only the three elementary schools serving grades 1-5 are here in question.

These three elementary schools are so-called neighborhood schools, each serving a small compact residential area and each reflecting the composition of the surrounding residential neighborhood in its pupil enrollment. The attendance zones or areas for each school were laid out many years ago and all parties to the present action agree that considerations of race, color or creed played no part in their formation. Rather, the lines were drawn with such factors in mind as safety, traffic conditions, proximity to the home and various other interests which were in keeping with prevailing attitudes recognizing the advantages of making the school an integral part of a given neighborhood. It was thought that great benefits were derived from such an arrangement in the form of greater parental interest in the activities of the school and greater exchange of ideas between home and school.

The three elementary schools in the district are called the Woodfield Road School, Davison Avenue School and the Lindner Place School. It seems that while the attendance areas served by these three schools were comparable for some time, the attendance area served by the Woodfield Road School has had a substantial increase in Negro residents and this, naturally, has become reflected in the pupils attending the Woodfield School. So far, the school board has attempted to rectify the resulting imbalance by transferring pupils from Woodfield to one of the other two elementary schools, but the imbalance at Woodfield continues.

In an attempt to correct the racial imbalance in grades 1-5, Negro children, through their parents, appealed to

the Commissioner from the refusal of the Board of Education to alter the zoning areas for school attendance, pursuant to section 310 of the Education Law providing for such appeals. The Commissioner appointed a 3-member committee, containing 2 members of the National Association for the Advancement of Colored People, to investigate the situation. This committee found that the attendance areas were of suitable size, as compact as possible, and placed the children within convenient walking distance of their schools. The Woodfield Road pupils were afforded programs of remedial work and enrichment at all grade levels. Relying upon its personal inspection of the three schools, the committee stated that the educational standards, as well as the quality of teaching, were similar. In addition, the committee noted that the action of the local board was not arbitrary and was not actuated by an attempt to contain the Negro population by means of artificial school zones. A finding was made that the Woodfield Road School was racially imbalanced, and *ipso facto* social, psychological and educational problems exist in *this* school district. In short, the committee found that the school district under consideration was "an excellent example of administrative planning", not created to separate the races, and that all the tangible aspects of education were equal. The Commissioner, concluding that a racial imbalance deprived the Negro children in Woodfield Road School of equal educational opportunities, ordered that the attendance areas of the district be drawn so that all children from kindergarten through the third grade attend either the Davison Avenue or Lindner Place Elementary School, and that all children in fourth and fifth grades attend the Woodfield Road School.

Although the Legislature has bestowed a vast grant of power upon the Commissioner of Education, the courts do have a limited scope of review. We have held that the courts possess the power to review his acts only when they

are "purely arbitrary" (*Matter of Board of Educ. of City of N. Y.* v. *Allen*, 6 N Y 2d 127, 136). As courts approach the pivotal issue of arbitrariness, proper performance of their function requires that the administrative agency show the actual grounds for its decision (*Matter of Scudder* v. *O'Connell*, 272 App. Div. 251). This exposition of the reasons for a decision has a twofold purpose. First, it enables the court to determine whether the findings themselves are properly supported by the evidence, and, second, it is necessary to determine whether the facts found support the decision itself (*Matter of Scudder* v. *O'Connell*, 272 App. Div. 251, *supra*).* In *New York Water Serv. Corp.* v. *Water Power & Control Comm.* (283 N. Y. 23) we stated: "Findings of fact in support of decisions by courts and administrative boards alike serve to give assurance to parties concerned that the decisions are based upon evidence of record and were not reached arbitrarily or influenced by extra-legal considerations * * * findings of fact in some form are essential to enable the parties and any appellate court intelligently to determine whether the decision follows as a matter of law from the facts stated as its basis and whether the findings of fact have any substantial support in the evidence" (p. 30). Throughout our reports, cases reiterate the substance of the above extract (see, e.g., *Matter of Barry* v. *O'Connell*, 303 N. Y. 46; *Matter of Perpente* v. *Moss*, 293 N. Y. 325; *Matter of Elite Dairy Prods.* v. *Ten Eyck*, 271 N. Y. 488). The Commissioner reasons as follows:

Major premise: Racially imbalanced schools *always* afford unequal educational opportunities.

Minor premise: This school is racially imbalanced.

Conclusion: Therefore, this school affords unequal educational opportunities.

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* Of course, the reasons underlying the determination are necessary to enable an aggrieved petitioner to ascertain which avenue of attack should be selected.

Since the record before this Court is utterly barren of any evidence which supports the Commissioner's conclusion that racial imbalance (an uncertain and indefinable phrase) necessarily results in unequal educational opportunities, I am constrained to hold that he has acted in a "purely arbitrary" manner. If it is not purely arbitrary to conclude and give no reasons therefor, I cannot conceive of any situation which may be so characterized.

Although I recognize the vast amount of power which is deposited in the Commissioner, I am unwilling to join the majority in placing him in an insulated position from which he is permitted to pronounce unreviewable conclusions devoid of any evidentiary support. Undoubtedly such is the reasoning of the prevailing opinion which, for all practical purposes, closes the courthouse doors to those who seek to review acts of the Commissioner in this area. If they are correct in the conclusion reached, the majority must be prepared to hold that assignment of pupils to create an ethnic or religious balance, or even the transportation of pupils (e.g., bussing) to implement a balancing plan, is beyond the review of the courts and may not be questioned therein. When the Commissioner states that he is acting in furtherance of sound educational policies, albeit there is no evidence in the record to support him, the majority holds that the courts will not be available for review.

I am unimpressed by the argument that the Commissioner might produce evidence and make findings to support his conclusions. Our function is to judge a case *on the record before the court*, not on assumption, speculation or conjecture.

Viewing the case in this posture, I need reach neither the impact of section 3201 of the Education Law nor the constitutional question to which Judge Van Voorhis has addressed himself, both of which the majority necessarily passes upon. However, I do state that I do not consider

Matter of Balaban v. *Rubin* (14 N Y 2d 193) authority in cases of this nature because (1) that case concerned the selection of a site for a *new* school; (2) race was not the *sole* factor which actuated the choice of location, and (3) there were neither transfers nor "oppressive results" involved.

For the reasons stated above, I vote to reverse the order of the Appellate Division.

Chief Judge Desmond and Judges Dye, Fuld, Burke and Bergan concur in *Per Curiam* opinion; Judges Van Voorhis and Scileppi dissent in separate opinions.

Order affirmed.

Appendix B—Judgment of the Court Below

At a term of the Supreme Court in the State of New York held in and for the County of Albany at the County Court House in the City of Albany, State of New York, on the 9th day of April 1965.

Present:

HON. SIDNEY F. FOSTER,
Justice.

Index No. 5217/1963

In the Matter of

The Application of MICHAEL VETERE, individually and as the parent and natural Guardian of ANITA VETERE, an infant, and as a Resident and Taxpayer of the County of Nassau, and of Union Free School District No. 12, Town of Hempstead, State of New York,

Petitioner-Appellant,

For an Order under Article 78 of the Civil Practice Act, to Review the Determinations and Orders of JAMES E. ALLEN, JR., as Commissioner of Education of the State of New York,

Respondent-Appellee,

Directing the Board of Education of Union Free School District No. 12 of the Town of Hempstead, New York to Assign Pupils to and Exclude Pupils from, Schools within the said District on the Basis of their Race.

Appendix B—Judgment of the Court Below

Index No. 5440/1963

In the Matter of

The Application under Article 78, CPLR, of LEWIS HUMMEL and HERMAN ABRAMS, individually and as the Respective Parents and Natural Guardians of SALLY ANN HUMMELL and ELLIOT ABRAMS, Infants, and as Residents and Taxpayers of the County of Nassau, and of Union Free School District No. 12 of the Town of Hempstead, New York,

Petitioners-Appellants,

against

JAMES E. ALLEN, JR., as Commissioner of Education of the State of New York, and the Board of Education of Union Free School District No. 12 of the Town of Hempstead, New York,

Respondents.

A Petition having been filed by Michael Vetere, individually and as the parent and natural guardian of Anita Vetere, an infant, and as a resident and taxpayer of the County of Nassau, and of Union Free School District No. 12, Town of Hempstead, State of New York, and by Lewis Hummel and Herman Abrams, individually and as the respective parents and natural guardians of Sally Ann Hummel and Elliot Abrams, infants and as residents and taxpayers of the County of Nassau, and of Union Free School District No. 12 of the Town of Hempstead, New York to review and set aside a determination of the respondent Commissioner of Education, directing the Board of Education of Union Free School District No. 12 of the Town of Hempstead, to take certain action in relation to the assignment of pupils to schools within said district and said petition having duly come on to be heard at a Special Term of

the Supreme Court, Albany County, and after due deliberation said Court having rendered its decision directing that the determination of the respondent Commissioner be annulled, and an appeal having been taken by the respondent Commissioner of Education from the order of the Supreme Court aforesaid to the Appellate Division, Third Department, and said appeal having duly come on to be argued before the said Appellate Division of the Supreme Court and that Court having reversed so much of the decision of the said Supreme Court that annulled a determination of the Commissioner of Education and as denied the motion of the Commissioner of Education to dismiss the petition and the Petitioners herein having appealed to this Court from the said order of the Appellate Division, Third Department, and said appeal having come on to be heard before the Court of Appeals and after argument and reargument by Mason L. Hampton, Jr., of Counsel for the Petitioners and by Mr. Thomas L. Driscoll of Counsel for the Board of Education aforesaid and by Charles A. Brind, Esq., of Counsel for the Respondent Commissioner and by Robert L. Carter, Esq., of Counsel for Respondent Mitchell, et al., and due deliberation having been had thereon and said Court having rendered its decision that the order of the Appellate Division of the Supreme Court appealed from be affirmed without costs, and having further ordered that the records and the proceedings in the Court of Appeals be remitted to the Supreme Court of the State of New York, there to be proceeded upon according to law,

Now, on motion of Charles A. Brind, Attorney for respondent, Commissioner of Education of the State of New York,

It is ordered that the order of the Court of Appeals in the above entitled matter which affirmed the decision of the Appellate Division, Third Department herein which

said order of the Appellate Division, Third Department reversed so much of the order of the Special Term as set aside the determination of the Commissioner of Education therein referred to, be and the same hereby is made the order of this Court, and it is further,

ORDERED that respondents have judgment dismissing the petitions herein.

Dated: Albany, New York
April 7, 1965

s/ SYDNEY F. FOSTER
Justice, Supreme Court

SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
AUG 9 1965
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1965

No. 246

MICHAEL VETERE,

Petitioner,

v.

JAMES E. ALLEN, JR., Commissioner of Education of the State of New York; BOARD OF EDUCATION OF UNION FREE SCHOOL DISTRICT NO. 12 OF THE TOWN OF HEMPSTEAD, NEW YORK; PATRICIA ANN MITCHELL, ET AL.; and THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE,

Respondents.

LEWIS HUMMEL and HERMAN ABRAMS,

Petitioners,

v.

JAMES E. ALLEN, JR., Commissioner of Education of the State of New York, and BOARD OF EDUCATION OF UNION FREE SCHOOL DISTRICT NO. 12 OF THE TOWN OF HEMPSTEAD, NEW YORK,

Respondents.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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JOAN FRANKLIN,
LEWIS M. STEEL,
of Counsel.

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IN THE

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MICHAEL VETERE,

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JAMES E. ALLEN, JR., Commissioner of Education of the State of New York; BOARD OF EDUCATION OF UNION FREE SCHOOL DISTRICT NO. 12 OF THE TOWN OF HEMPSTEAD, NEW YORK; PATRICIA ANN MITCHELL, *et al.*, and THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE,

Respondents.

LEWIS HUMMEL and HERMAN ABRAMS,

Petitioners,

v.

JAMES E. ALLEN, JR., Commissioner of Education of the State of New York, and BOARD OF EDUCATION OF UNION FREE SCHOOL DISTRICT NO. 12 OF THE TOWN OF HEMPSTEAD, NEW YORK,

Respondents.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

Question Presented

Has the Commissioner of Education of the State of New York the authority to require a board of education to eliminate racial imbalance?

Relevant Statutes

Sections 207, 301, 305, 308, 309, 310 and 311 of the New York Education Law, McKinney's Consolidated Laws of New York, pages 68-69, 142-143, 144-148, 166-167, 193 are the statutes pertinent to this case and are set out in the Appendix at pages A-1 to A-9, *infra*.

Statement of the Case

This litigation was precipitated in 1962 by an appeal by the respondents Patricia Ann Mitchell and other Negro pupils to the Commissioner of Education pursuant to § 310 of the New York Education Law, seeking the reduction of racial imbalance [1] in Union Free School District No. 12. As a result of that appeal in November 1962, and subsequent to a hearing of the parties involved, the Commissioner directed the Advisory Committee on Human Relations and Community Tensions to conduct a study of educational conditions prevailing in School District No. 12, and to report its findings and recommendations (R. 63-64).

The Committee had been appointed by the Commissioner on June of 1962 to advise and assist the State Education Department and local school districts in finding solutions to the problem of imbalance and had succeeded in developing guide lines (A-14).

That Committee, while observing that the Board of Education supplied approximately equal physical facilities and

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[1] In January 1960, the Board of Regents, the highest educational authority in the State of New York, declared the elimination of racial imbalance to be an integral part of its educational policy and a step essential to the effectuation of equal educational opportunity for all children (A-10 though A-12). The State Education Department, of which the Commissioner of Education is the chief officer, was charged specifically with implementation of the policy (A-11). The Regents urged both governmental agencies and the citizenry in general to take those concrete measures which would facilitate the attainment of its announced goal.

set common educational standards for each of its three elementary schools, found that racial imbalance did in fact exist in the Woodfield Road School (R. 97). Both the Lindner Place and Davidson Avenue Schools had 86% white student populations, while the Woodfield School, located in a predominantly Negro area, was 75% Negro and was generally viewed as the Negro school (R. 97). The Committee determined that the educational defect inherent in such a racially inmbalanced school could be cured only by altering the racial composition of its student body (R. 97). To that effect the Committee offered four alternative plans including Proposal I, commonly referred to as the Princeton Plan, under which pupils are assigned to schools on the basis of grade rather than residence (R. 101-103).

After reviewing the arguments of the parties and the report of the Committee, the Commissioner issued the order of June 17, 1963, which is under attack in these proceedings (R. 101-116). The order directed the Board to institute Proposal I in the 1963-64 school year, by centralizing all classes from grades K-3 in the Lindner and Davidson Schools and those from grades 4-5 in the Woodfield Road School (R. 101-102).

On July 16, 1963, the Board of Education applied to reopen the appeal and to stay the decision. This motion to reopen was refused on August 13 (R. 116-121). The Board, later in that month, proposed an alternative plan, which is not at issue in these proceedings (R. 79-80, 24-29). This plan was rejected by the Commissioner on September 5, 1963, as not in compliance with his order (R. 121-123).

On August 23, 1963, at a Special Term of the Supreme Court of the County of Albany, petitioners, parents of white children, commenced the present suit to annul the Commissioner's order. Respondents[2] as parties in the related

[2] In so far as the National Association for the Advancement of Colored People is included as a respondent, this case is entitled incorrectly. The National Association for the Advancement of Colored People is not and has never been a party to these proceedings.

proceedings before the Commissioner, were made parties to this proceeding by an order pursuant to §§ 1001, 1002 and 1003 of the New York Civil Practice Laws and Rules (R. 9-10).

Special Term determined that § 3201 was violated and did not reach the constitutional issue (R. 38-49). In July, 1964, the Appellate Division reversed the order and judgment of Special Term (R. 12-29).

On April 9, 1965, the Court of Appeals affirmed the judgment and order of the Appellate Division, holding that the New York Commissioner of Education had quasi-judicial authority to consider all matters pertaining to the general school system of the state and that he had acted within the scope of such authority, and further that his decision was not arbitrary. On June 1, 1965, petitioners filed a petition for a writ of certiorari with this Court, to which this brief responds.

REASON FOR THE DENIAL OF THE WRIT

I

The decision below is firmly supportable on independent grounds of state law and, therefore, is not subject to review by this Court.

In 1945, this Court reaffirmed a long-standing constitutional policy by declaring:

> This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds. *Herb* v. *Pitcairn*, 324 U. S. 117, 125 (1945), [and cases cited therein].

This proposition holds true even though the state court has actually ruled on a federal question where its decision is dictated essentially by state law. *Fox Film Corp.* v. *Muller*, 296 U. S. 207 (1935).

This historic policy stems from judicial reluctance to render advisory opinions by interjecting constitutional issues into controversies, which state tribunals have resolved primarily in terms of state law. Whether the non-federal ground on which the state court relied is right or wrong is not of concern to the Court. "It is enough that it is, at least, not without fair support." *Fox Film Corp.* v. *Muller, supra,* at page 209.

The decision of the New York Court of Appeals was based squarely on independent and adequate grounds of state law and policy, thus defeating the claim that there exists any important federal question and, in consequence, the *certiorari* jurisdiction of this Court. Recent authority for this reasoning is found in *Jankovich, et al.* v. *Indiana Toll Road Commission,* 379 U. S. 487, 490-91 (1965), where the Court stated in denying a writ of certiorari, that:

> . . . The [Indiana] court discussed an Indiana statute . . . and a prior interpretation of state law . . . But nothing in the court's opinion suggests that its conclusion . . . flows from a federal rather than a state source. Indeed, the organization and language of the opinion indicates that, at the least, the state law is an equal ground of decision.

In accord *Black* v. *Cutler Laboratories,* 351 U. S. 292 (1956).

In *Jankovich,* there was some basis for petitioners' assertion of a federal question since the state court, in arriving at its decision, dealt with provisions of both the state and federal constitutions. In this case, however, the "organization and language of the opinion" leave no doubt that the New York court based its decision squarely and entirely on matters of state law.

The sole issue presented to the court below, and determined by it, was whether or not the Commissioner of Education was authorized under New York law to direct a Board of Education to eliminate racial imbalance in implementation of state educational policy. This question was resolved affirmatively by the court after a review of

the powers of both the Board of Regents and the Commissioner *vis a vis* local school boards under Sections 207, 301, 305(1) and 310 of the New York Education Law.

Section 207 of the Education Law reposes in the Board of Regents the express power both to formulate and to control the educational policy of the State of New York (A-1). Under Sections 301 and 305 (1), the Commissioner is explicitly made the chief administrative officer of the educational system and is bound to enforce "All laws relating to the educational system and to execute all polices of the Board of Regents" (A-1, A-2).[3]

The court below thoroughly examined the broad powers granted the Commissioner over appeals from decisions of local school authorities as in the present case, under Section 310 of the Education Law, the relevant portion of which provides that:

> Any person conceiving himself aggrieved may appeal or petition to the commissioner of education who is hereby authorized and required to examine and decide the same; and the commissioner of education may also institute such proceedings as are authorized under this article and his decision in such appeals, petitions or proceedings shall be final and conclusive, and not subject to question or review in any place or court whatever. Such appeal or petition may be made in consequence of any action:
>
> 7. By any other official act or decision of any officer, school authorities, or meetings concerning any other matter under this chapter, or any other act pertaining to common schools.

The court declared that *the very purpose* of the legislative grant of quasi-judicial powers to the Commissioner under §310 of the Education Law was to "make all mat-

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[3] Sections 308, 309 and 311 of the Education Law underscore the broad and practically all-inclusive power given the Commissioner over the actions of local school boards. These sections are set forth in the appendix at pages A-7, A-8, A-9.

ters pertaining to the general school system of the state within the authority and control of the Education Department and to remove the same as far as practicable and possible from controversies in the courts." *Bullock* v. *Cooley,* 225 N. Y. 566, 576-7, 122 N. E. 630, 633, (1919). This has been a principle of New York law for over 130 years. *Easton* v. *Calendar,* 11 Wend. 90 (1833).

The Commissioner brings to bear on the various issues brought before him on appeal not only those powers of a judicial character referred to above, but also all of the expert knowledge which must go into the execution of sound *educational* policy for the state.

This blend of powers gives the Commissioner broader power over local school officials than that which rests in the courts in that the Commissioner may substitute his own judgment for that of local school officials. *Craig v. Board of Education of the City of New York,* 173 Misc. 969, 19 N. Y. S. 2d 293 (*S. Ct. 1940*), aff'd 262 A. D. 706, 27 N. Y. S. 2d 993 (1941); *Board of Education* v. *Graves,* 243 N. Y. 204, 153 N. E. 49 (1926); *Board of Education of the City of New York* v. *Allen,* 6 N. Y. 2d 127, 160 N. E. 2d 60 (1959). Thus, a decision of the Commissioner under § 310 is considered final and conclusive, and only when purely arbitrary may the court intervene.[4]

Applying the law to the facts of this case, the Court of Appeals was impelled to conclude that the Commissioner was authorized to compel local boards to eliminate racial imbalance. The Board of Regents had not only promulgated its educational policy pursuant to Section 207, requiring the

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[4]. The scope of review which the state tribunals chose to accord the decision of an administrative body of officials, whether broad (as in *Black,* supra) or narrow (as here) is not a proper matter for the concern of this Court:

> "Of course, the scope of Review of such findings under the California Arbitration Act is a matter exclusively for the courts of that state and is not our concern. *Black, supra,* U. S. at 298, S. Ct. at 827, L. Ed. at 1196."

correction of imbalance as a means of removing impediments to learning and facilitating the attainment of goals of democratic education, but had specifically charged the Commissioner with the task of implementation (A-11) Under Section 301 and 305 (1), the Commissioner was bound to accept that charge. Clearly then, when respondents appealed under Section 310, from the failure of the Malverne-Lakeview Board of Education to correct racial imbalance, on finding that such imbalance existed, the Commissioner in exercising both his administrative and quasi-judicial powers was obligated to order its elimination. The Commissioner did indeed find that the Woodfield School, which had a 75% Negro student body and was generally characterized in the community as the Negro school, was imbalanced (R. 64-65).

Thus his decision requiring the Board to institute a plan designed to correct the racial imbalance in its school system was based not only on his own evaluation of the educational needs of one particular school district but was a necessary consequence of the general policy of the New York Board of Regents.

Hence the decision of the Court of Appeals upholding that determination of the Commissioner, governed, as it was, solely by state law, provides a compelling reason for this Court to deny the writ.

CONCLUSION

For this reason, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

Section 207 of the New York Education Law

§ 207. Legislative Power

Subject and in conformity to the constitution and laws of the state, the regents shall exercise legislative functions concerning the educational system of the state determine its educational policies, and, except, as to the judicial functions of the commissioner of education, establish rules for carrying into effect the laws and policies of the state, relating to education, and the functions, powers, duties and trusts conferred or charged upon the university and the education department. But no enactment of the regents shall modify in any degree the freedom of the governing body of any seminary for the training of priests or clergymen to determine and regulate the entire course of religious, doctrinal or theological instruction to be given in such institution. No rule by which more than a majority vote shall be required for any specified action by the regents shall be amended, suspended or repealed by a smaller vote than that required for action thereunder. Rules or regulations, or amendments or repeals thereof, adopted or prescribed by the commissioner of education as provided by law shall not be effective unless and until approved by the regents, except where authority is conferred by the regents upon the commissioner of education to adopt, prescribe, amend or repeal such rules or regulations.

Section 301 of the New York Education Law

§ 301. Commissioner of Education Continued

The office of commissioner of education is hereby continued. Subject to the general direction and control of the regents of the university, he shall continue to have, exercise and perform the functions, powers and duties conferred or imposed by law upon the commissioner of education. He shall continue to exercise the judicial functions conferred

by law upon the commissioner of education and, subject to rules of the regents, to make, execute and issue in the name of the department such determinations, decisions, orders, notices and certificates as may be required for the exercise and performance of the functions, powers and duties conferred or imposed upon the department. With the approval of the board of regents, he shall continue to prepare the annual estimates and requests for appropriations for operation, maintenance and construction of the New York state school for the blind and shall review and incorporate into the departmental budget the state university program budget transmitted to him by the state university trustees. All moneys appropriated for the New York school for the blind, or derived from other sources in the course of the administration thereof, shall be expended upon vouchers approved by the commissioner of education, when and in the manner authorized by the board of regents. The regents may adopt rules conferring and imposing upon the commissioner of education such additional powers and duties as may be required for the effective administration of the department and of the state system of education. As amended L. 1950, c. 634, § 2, eff. Sept. 1, 1950.

Section 305 of the New York Education Law

§ 305. General Powers and Duties

The commissioner of education is hereby charged with the following powers and duties:

1. He is the chief executive officer of the state system of education and of the board of regents. He shall enforce all general and special laws relating to the educational system of the state and execute all educational policies determined upon by the board of regents.

2. He shall have general supervision over all schools and institutions which are subject to the provisions of this

chapter, or of any statute relating to education, and shall cause the same to be examined and inspected, and shall advise and guide the school officers of all districts and cities of the state in relation to their duties and the general management of the schools under their control.

3. He shall have general supervision of industrial schools, trade schools and schools of agriculture, mechanic arts and home making; he shall prescribe regulations governing the licensing of the teachers employed therein; and he is hereby authorized, empowered and directed to provide for the inspection of such schools, to take necessary action to make effectual the provisions therefor, and to advise and assist boards of education in the several cities and school districts in the establishment, organization and management of such schools.

4. He shall also have general supervision over the state teachers colleges and state colleges for teachers which have been, or which may hereafter be, established as required by the provisions of this chapter.

5. He shall be ex officio a trustee of Cornell university.

6. He shall be responsible for the safe keeping and proper use of the department and university seal and of the books, records and other property in charge of the regents, and for the proper administration and discipline of the various officers and divisions of the education department.

7. He may annul upon cause shown to his satisfaction any certificate of qualification granted to a teacher by any authority whatever or declare any diploma issued by a state teachers college and state colleges for teachers ineffective and null as a qualification to teach a common school within this state, and he may reconsider and reverse his action in any such matter.

8. He shall cause to be prepared and keep in his office records of all persons who have received, or shall receive, certificates of qualification to teach or diplomas of the state teachers colleges, and state colleges for teachers, with the dates thereof, and shall note thereon all annulments of such certificates and diplomas, and reversals thereof, with the dates and causes thereof, together with such other particulars as he may deem expedient.

9. The commissioner shall procure with the consent of the federal authorities complete lists giving the names, ages and destination within the state of all alien children of school age and such other facts as will tend to identify them, and shall deliver copies of such lists to the several boards of education and school boards in the respective localities within the state to which said children shall be destined, to aid in the enforcement of the provisions of this chapter relative to the compulsory attendance at school of children of school age.

10. He may administer oaths and take affidavits concerning any matter relating to the duties of his office or pertaining in any way to the schools of the state or any part thereof.

11. He is hereby authorized to furnish, by means of pictorial or graphic representations, additional facilities for instruction in geography, history, science and kindred subjects, to the schools, institutions and organizations under the supervision of the regents. Material collected for this purpose may, under regents general rules, be lent for a limited time to responsible institutions and organizations for the benefit of artisans, mechanics, and other citizens of the several communities of the state. He may from time to time enter into contracts necessary for carrying out this provision.

12. The commissioner of education is authorized and directed to establish and provide for the maintenance and conduct of courses of study or training in state teachers colleges and state colleges for teachers and in colleges and universities and other educational institutions and in connection with other educational agencies for the purpose of training teachers in principles and methods of instruction, and to give them knowledge to fit them to instruct foreign born and native adults and minors over sixteen years of age in evening, extension, factory, home and community classes. Such courses of study shall be prescribed by the commissioner of education and shall continue for a period of not less than one year. No teacher employed to instruct foreign born and native adults and minors over sixteen years of age shall be employed by the state or compensated in whole or in part by the state, unless he shall be compensated such course of study or training or shall have an equivalent thereof, to be determined under the regulations of the commissioner of education. A special certificate shall be issued to teachers who have completed such course of study or a course of instruction which is equivalent thereto, provided, however, that temporary permits may be issued by the commissioner of education to teachers who are qualified to give such instruction pending the completion of such a course of study or training.

13. The commissioner of education or the board of education or trustees of any city or school district may provide for the purpose of giving instruction to foreign-born and schools in connection with factories, places of employment, or in such other places as he or they may deem advisable, for the purpose of giving instruction to foreign-born and native adults and minors over the age of sixteen years. Such course of instruction or study shall include instruction in English, history, civics and other subjects tending to promote good citizenship and to increase vocational efficiency. Such course of instruction and study shall be

prescribed by the regents of the university of the state of New York, and shall be in conformity with rules to be adopted by them.

14. All contracts for the transportation of school children involving an annual expenditure in excess of fifteen hundred dollars shall be awarded to the lowest responsible bidder, which responsibility shall be determined by the board of education or the trustee of a district, with power hereby vested in the commissioner to reject any or all bids, if, in his opinion, the best interests of the district will be promoted thereby and, upon such rejection of all bids, the commissioner shall order the district to seek, obtain and consider new proposals. All proposals for such transportation shall be in such form as the commissioner may prescribe. The board of education or the trustee of a district, as the case may be, shall request proposals for such transportation by advertisement published at least once in each week for two successive weeks in a newspaper published in the county in which such district is located and which has a general circulation in such district. If no newspaper is published in the county in which such district is located, publication of such advertisement in a newspaper shall be unnecessary, but in such event said notice shall be posted in six conspicuous places in such district, one of which places shall be the main entrance to the school in such district.

15. The extension industrial teacher training courses heretofore established are continued under the jurisdiction and control of the education department. Members of the faculty to teach such courses shall be appointed by the commissioner of education and, subject to the approval of the director of the budget, shall be classified, allocated and paid in accordance with the schedules contained in section three hundred fifty-five-a of this chapter.

17.[1] Whenever a mistake has been made, or an honest dispute exists, as to the location of the division line between land owned by the state, which is under the jurisdiction, care, custody or control of the department of education, and adjoining privately owned land, the commissioner of education, acting for and on behalf and in the name of the people of the state of New York, may enter into a boundary line agreement, fixing and determining the division line between such lands, subject to the approval of the attorney general as to form, content and manner of execution.

18. He shall also have and execute such further powers and duties as he shall be charged with by the regents. As amended L. 1948, c. 22; L. 1950, c. 29; L. 1950, c. 113, §§ 2, 3; L. 1951, c. 533; L. 1952, c. 744, § 2, eff. April 15, 1952.

Section 308 of the New York Education Law

§ 308. Other Powers

The commissioner of education shall also have power and it shall be his duty to cause to be instituted such proceedings or processes as may be necessary to properly enforce and give effect to any provision in this chapter or in any other general or special law pertaining to the school system of the state or any part thereof or to any school district or city. He shall possess the power and authority to likewise enforce any rule or direction of the regents.

Section 309 of the New York Education Law

§ 309. Schools of Union Free School Districts and Cities

The schools of every union free school district and of every city in all their departments shall be subject to the

[1] There is no subdivision 16.

visitation of the commissioner of education. He is charged with the general supervision of their boards of education and their management and conduct of all departments of instruction.

Section 310 of the New York Education Law

§ 310. Appeals or Petitions to Commissioner of Education and Other Proceedings

Any person conceiving himself aggrieved may appeal or petition to the commissioner of education who is hereby authorized and required to examine and decide the same; and the commissioner of education may also institute such proceedings as are authorized under this article and his decision in such appeals, petitions or proceedings shall be final and conclusive, and not subject to question or review in any place or court whatever. Such appeal or petition may be made in consequence of any action:

1. By any school district meeting.

2. By any district superintendent and other officers, in forming or altering, or refusing to form or alter, any school district, or in refusing to apportion any school moneys to any such district or part of a district.

3. By a county treasurer or other distributing agent in refusing to pay any such moneys to any such district.

4. By the trustees of any district in paying or refusing to pay any teacher, or in refusing to admit any scholar gratuitously into any school or on any other matter upon which they may or do officially act.

5. By any trustees of any school library concerning such library, or the books therein, or the use of such books.

6. By any district meeting in relation to the library or any other matter pertaining to the affairs of the district.

7. By any other official act or decision of any officer, school authorities, or meetings concerning any other matter under this chapter, or any other act pertaining to common schools.

Section 311 of the New York Education Law

§ 311. POWERS OF COMMISSIONER UPON APPEALS OR PETITIONS, ET CETERA

The commissioner, in reference to such appeals, petitions or proceedings, shall have power:

1. To regulate the practice therein.

2. To determine whether an appeal shall stay proceedings, and prescribe conditions upon which it shall or shall not so operate.

3. To decline to entertain or to dismiss an appeal, when it shall appear that the appellant has no interest in the matter appealed from, and that the matter is not a matter of public concern, and that the person injuriously affected by the act or decision appealed from is incompetent to appeal.

4. To make all orders, by directing the levying of taxes or otherwise, which may, in his judgment, be proper or necessary to give effect to his decision.

THE BOARD OF REGENTS
THE UNIVERSITY OF THE STATE OF NEW YORK
STATEMENT OF POLICY ON DE FACTO SEGREGATED
PUBLIC SCHOOLS

Adopted January 28, 1960

"After the Supreme Court decision of May 1954, we have all been a part in re-evaluating the role of education in a democracy. It was of greatest significance that the Court in its historic decision stated:

> 'We must consider public education in the light of its full development and its present place in American life throughout the nation . . .
>
> 'Today, education is perhaps the most important function of state and local governments . . . it is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education . . .
>
> ' . . . to separate (them) from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone . . . '

"The State of New York has long held the principle that equal educational opportunity for all children, without regard to differences in economic, national, religious or racial background, is a manifestation of the vitality of our American democratic society and is essential to its continuation. This fundamental educational principle has long since been written into Education Law and policy.

Subsequent events have repeatedly given it moral reaffirmation. Nevertheless, all citizens have the responsibility to reexamine the schools within their local systems in order to determine whether they conform to this standard so clearly seen to be the right of every child.

"Modern psychological knowledge indicates that schools enrolling students largely of homogeneous, ethnic origin, may damage the personality of minority group children. Such schools decrease their motivation and thus impair the ability to learn. Public education in such a setting is socially unrealistic, blocks the attainment of the goals of democratic education, and is wasteful of manpower and talent, whether this situation occurs by law or by fact.

"In seeking to provide effective education for all the children of this State, boards of education are faced with many obstacles in the form of complex social and community problems. Among them is the existence of residential segregation which leads to schools with students predominantly of one race on the elementary and high school levels.

"In spite of these and other difficulties, the Regents are determined to accept this challenge facing our schools today. We charge the Regents Advisory Council on Intercultural Relations in Education, working in close cooperation with the State Education Department, to assist in seeking solutions to the educational aspects of the problem. The Council's recommendation for action, based on systematic and objective study, will be reported to the Regents in due course.

"We recognize that we who have been given the responsibility for the education of the children and youth in our State can deal directly with only these educational aspects. There are larger community problems which influence the quality of education in, and the ethnic composition of our schools. So long as these larger social problems remain unsolved, it will be difficult to solve some of the basic and related educational situations. For this reason,

therefore, we call upon all our citizens and their agencies of government and their civic organizations to take concrete steps to provide the social climate which will make it possible for us to increase the effectiveness of education. Only with this cooperation will we be able to provide that type of democratic education which will enable all children to contribute their understanding, knowledge and skills to increase the greatness of our State and our Nation."

THE UNIVERSITY OF THE STATE OF NEW YORK
THE STATE EDUCATION DEPARTMENT
OFFICE OF THE PRESIDENT OF THE UNIVERSITY
AND COMMISSIONER OF EDUCATION
Albany

June 14, 1963

To: All Chief Local School Administrators and Presidents of Boards of Education

Subject: *Racial Imbalance in Schools*

The State Education Department is constantly seeking to improve policies and practices which will bring about the full operation of the principle of equality of educational opportunity for persons of all social, economic and cultural backgrounds. In line with this effort and after studying the implications of the 1954 decision of the United States Supreme Court, the Board of Regents adopted and announced in January 1961, a Statement of Policy which contained the following paragraph:

> "The State of New York has long held the principle that equal opportunity for all children, without regard to differences in economic, national, religious or racial background, is a manifestation

> of the vitality of our American democratic society and is essential to its continuation. This fundamental educational principle has long since been written into Education Law and policy. Subsequent events have repeatedly given it moral reaffirmation. Nevertheless, all citizens have the responsibility to reexamine the schools within their local systems in order to determine whether they conform to this standard so clearly seen to be the right of every child."

The Regents' statement goes on to point out that modern psychological and sociological knowledge seems to indicate that in schools in which the enrollment is largely from a minority group of homogeneous, ethnic origin, the personality of these minority group children may be damaged. There is a decrease in motivation and thus an impairment of ability to learn. Public education in such a situation is socially unrealistic, blocking the attainment of the goals of democratic education, and wasteful of manpower and talent, whether the situation occurs by law or by fact.

To implement the Regents' Policy, the Department has carried on through its Division of Intercultural Relations, a continuing program of education and assistance aimed toward securing greater understanding and constructive action throughout the schools and colleges of the State. Important progress has been made, especially in higher education.

To assemble additional information on the problem, the Department conducted in November 1961, a racial census of the elementary schools of the State. The findings of that study were reported in July 1962. The report identified a number of districts in which the ratio of Negro to white pupils was relatively high and suggested that these districts should give added attention to this situation.

In June 1962, I appointed a three-member Advisory Committee on Human Relations and Community Tensions to advise and assist the Department and the local school districts. From its studies, the Committee has developed a statement of principles for dealing with racial imbalance in the schools. A copy of this statement is enclosed.

The position of the Department, based on the policy of the Regents, and the principles of the Commissioner's Advisory Committee, is that the racial imbalance existing in a school in which the enrollment is wholly or predominantly Negro interferes with the achievement of equality of educational opportunity and must therefore be eliminated from the schools of New York State.

If this is to be accomplished, there must be corrective action in each community where such imbalance exists. In keeping with the principle of local control, it is the responsibility of the local school authorities in such communities to develop and implement the necessary plans.

It is recognized that in some communities residential patterns and other factors may present serious obstacles to the attainment of racially balanced schools. This does not, however, relieve the school authorities of their responsibility for doing everything within their power, consistent with the principles of sound education, to achieve an equitable balance.

In order that the Department may know what your plans are for carrying out this responsibility, *I request that you submit to me by September 1, 1963, the following information:*

1. A statement indicating the situation in your district with regard to any problem of racial imbalance, regardless of the number of Negro children enrolled, or to the actual existence of or trend toward racial imbalance. At this time and *for the purpose of this report,* a racially imbalanced school is defined as one having 50 per cent or more Negro pupils enrolled.

2. A statement of policy by your board of education with respect to the maintenance of racial balance in your schools.

3. In districts where racial imbalance exists, or is a problem, a report of progress made toward eliminating it.

4. In such districts, your plan for further action, including estimates of the additional cost, if any, and of the time required for carrying out your plan.

In addition to this request for information from your district, I have directed the staff of the State Education Department to reexamine all State laws, rules, regulations, policies and programs pertinent to the issue here under discussion, and to submit to me by the same date any revisions that may be necessary for making them more effective instruments for the elimination of racial imbalance.

These requests for more positive action to eliminate racial imbalance in the schools of New York State are a logical extension of State law and policy, necessary if the principle of equality of educational opportunity is to apply to all, regardless of race, color, creed or economic background. I am aware that many of you have already taken constructive action in this regard and that you will continue to do so. I am confident that working together we shall be able to achieve solutions, which will truly serve the purposes of education in a democracy.

Please let me know how the Department can be of assistance to you in this important effort.

Sincerely,

Commissioner of Education
James E. Allen, Jr.
JAMES E. ALLEN, JR.

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IN THE

Supreme Court of the United States

No. 246

MICHAEL VETERE,

Petitioner,

v.

JAMES E. ALLEN, JR., Commissioner of Education of the State of New York; BOARD OF EDUCATION OF UNION FREE SCHOOL DISTRICT NO. 12 OF THE TOWN OF HEMPSTEAD, NEW YORK; PATRICIA ANN MITCHELL, *et al.*; and THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE,

Respondents.

LEWIS HUMMEL and HERMAN ABRAMS,

Petitioners,

v.

JAMES E. ALLEN, JR., Commissioner of Education of the State of New York, and BOARD OF EDUCATION OF UNION FREE SCHOOL DISTRICT NO. 12 OF THE TOWN OF HEMPSTEAD, NEW YORK,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Respondent James E. Allen, Jr., as Commissioner of Education of the State of New York respectfully prays that the petition herein for writ of certiorari to the Court of Appeals of the State of New York be denied.

Opinions Below

The decision of the New York State Court of Appeals is reported in 15 N. Y. 2d 259, 206 N. E. 2d 174, and is

reprinted in Appendix A at pages 19-38 of the Petition for Certiorari. The majority opinion is printed therein at page 27 and the dissenting opinions at pages 29 and 33. The judgment is printed in said petition in Appendix B at page 39. The opinion of the Appellate Division, Third Department is reported in 21 A. D. 2d 561, 251 N. Y. S. 2d 480 and appears at page 12 of the Record of the Court of Appeals. The opinion of the Supreme Court, County of Albany is reported in 41 Misc. 2d 200, 245 N. Y. S. 2d 682 and appears in the record on appeal to the Court of Appeals at page 38.

Jurisdiction

The asserted basis of jurisdiction is an alleged deprivation of petitioner's rights, privileges and immunities under the 14th Amendment of the United States Constitution and 42 U. S. Code Sections 2000c, *et seq.*

Question Presented

Has petitioner been deprived of the equal protection of the law or of liberty without due process of the law by a decision of the Commissioner of Education directing a school district to eliminate the educational disadvantages resulting from *de facto* segregation by centralizing the elementary grades?

Statutes Involved

U. S. Constitution, Amendment XIV.

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

42 U. S. Code Section 2000c (Civil Rights Act of 1964, Section 401)

"As used in this title—

(b) 'Desegregation' means the assignment of students to public schools and within such schools without regard to their race, color, religion, or national origin, but 'desegregation' shall not mean the assignment of students to public schools in order to overcome racial imbalance."

New York State

Education Law Section 310

Any person conceiving himself aggrieved may appeal or petition to the Commissioner of Education who is hereby authorized and required to examine and decide the same.

Statement

In November, 1962, the Commissioner of Education, hereinafter referred to as the Commissioner, acting under the authority conferred in him by Section 310 of the Educational Law, heard an appeal brought by parents of children attending elementary schools in the respondent school district from the refusal of the Board of Education of said district to take action to alleviate racial imbalance therein. The Commissioner referred the matter to a three man advisory committee for an exhaustive study of the situation. After receiving their report, the Commissioner rendered his decision, which appears at page 73 of the Record, in which he held that although there was no evidence of deliberate segregation, nevertheless racial imbalance did exist in the respondent district, and the existence of such imbalance was detrimental to the education of the children affected thereby. Accordingly, the Commissioner ordered

the Board of Education to adopt a plan which would eliminate the educational disadvantages and alleviate the racial imbalance. This plan carefully avoided the more questionable elements present in some other plans. Pupils in previously existing classes are not to be split up and sent to different schools in order to conform to an arbitrary racial quota, and no additional transportation is required. Groups of children of one race are not being moved into a distant school serving a neighborhood of children of another race. The unique facts in this school district made it possible to avoid any form of segregation by centralizing grades four and five in one school and by centralizing kindergarten and grades one through three in two schools, instead of dividing all of these grades among the three elementary schools. Under this plan each pupil, regardless of race, is sent to the school serving his grade, and the racial balance will be determined by the racial population of the whole district.

An application by the Board of Education for a reopening of the appeal was denied by the Commissioner. This action was then commenced by the petitioners-appellants who were parents of white children in the district. The Supreme Court of the State of New York, County of Albany, reversed the Commissioner's decision upon the grounds that Section 3201 of the Education Law of the State of New York providing that "no person shall be refused admission into or be excluded from any public school in the State of New York on account of race, creed, color or national origin" prevented any action by the Commissioner of Education assigning pupils to schools because of their race, and that such assignment was illegal whether intended to promote segregation or to alleviate it.

Upon appeal by the Commissioner to the Appellate Division, Third Department, State of New York, the decision

of the Supreme Court was reversed. The petitioners-appellants thereupon affirmed the decision of the Commissioner and of the Appellate Division by a vote of five to two.

The opinion of the Court of Appeals settled the question of the application of Section 3201 of the Education Law and determined that under New York State Law the Commissioner had the power in the proceeding brought before him to order the respondent Board of Education to accept this particular plan of pupil assignment.

The essential question at this time is whether or not this particular plan of pupil assignments violates the Federal Constitutional rights of the petitioners-appellants. We contend that this is not a substantial Federal question and that there is no conflict in the existing law on the point.

ARGUMENT

I

There is no substantial Federal question.

Although problems of racial imbalance or *de facto* segregation have arisen in a number of cases which presented serious constitutional questions, there are no such questions involved in this case. The order appealed from concerns one school district with a unique factual situation, in which the Commissioner has, in effect, centralized the elementary schools, in order to eliminate the educational consequences of one predominately Negro school. The Commissioner's action was based not on the Federal Constitution or Federal law, but on State law, and has been upheld by the highest State court.

The petitioners-appellants argue that any action by a State which takes into account the race of a pupil in de-

termining assignments to schools is unconstitutional, and that it does not matter whether the purpose of the State action is to improve the educational system, or to promote segregation, or integration. This argument would refute or negate all of the progress which has been made since the decision in the *Brown* case in eliminating segregation in the public schools and indeed in any other area. This Court has recognized that segregated schools are, by their very nature, educationally inferior. It would make no difference in this respect whether the segregation was deliberate or arose as the result of residential or other factors beyond the control of the school board. *Brown* v. *Board of Education,* 347 U. S. 483; *Blocker* v. *Board of Education,* 226 F. Supp. 208, 229 F. Supp. 709, (E. D. N. Y. 1964); *Jackson* v. *Pasadena City School District,* 59 Cal. 2d 876, 382 P. 2d 878 (1963); *Barksdale* v. *Springfield School Committee,* 237 F. Supp. 543 (D. Mass. 1965). Although this court has not, as yet, decided that affirmative action is required by federal law or by the Federal Constitution to correct *de facto* segregation, no such decision is necessary in this case. To justify the granting of certiorari, petitioners must show that this particular order of the Commissioner violated their constitutional rights. The constitution does not, as petitioners argue, prohibit the consideration of racial factors. On the contrary, where such factors have been taken into account in the past, and segregation has resulted, the constitution imposes a duty on the State authorities to continue to take such factors into account and correct the situation. *Brown* v. *Board of Education, supra; Bolling* v. *Sharpe,* 347 U. S. 497. What "equal protection" of the law does mean in this respect is that children of all races be given the same educational opportunities. The children of petitioners and the children of the Negro parents in this particular school

district will be treated in exactly the same manner. No special transportation will be required, and no groups of children will be shuffled about like cards, solely to achieve a better racial balance. No racial quota is to be arbitrarily imposed. This school district is so small that the adoption of this plan, centralizing the elementary grades, solves the problem. No child has a constitutional right to attend any particular neighborhood school. *Van Blerkom* v. *Donovan,* 15 N. Y. 2d 399; *Blocker* v. *Board of Education, supra; Jackson* v. *Pasadena City School District, supra.* School districts have of necessity the right to alter patterns of pupil assignments so long as such action is reasonable, and race is one of the factors which may be taken into account. Under the circumstances, the order of the Commissioner to change the pupil assignments so as to eliminate the educational disadvantages accompanying *de facto* segregation is not unconstitutional. *Balaban* v. *Rubin,* 14 N. Y. 2d 193, cert. den. 379 U. S. 881; *Morean* v. *Board of Education,* 42 N. J. 237, 200 A. 2d 97; *Jackson* v. *Pasadena City School District, supra; Blocker* v. *Board of Education, supra; Barksdale* v. *Springfield School Committee, supra.*

II

There is no substantial conflict in the decisions of the State and Federal Courts on the issues involved in this case.

It is settled law that in New York State school districts may be required to correct *de facto* segregation. Decision appealed from, Appendix A to petition; *Balaban* v. *Rubin, supra; Van Blerkom* v. *Donovan, supra.* Whether other states may differ on this point is irrelevant, as this is a matter of State law.

Since the Commissioner's decision is based upon State law, it is not necessary to reach the question whether such action would also be required by the Federal Constitution or Federal Law, and the decisions of other courts on that issue are not relevant in this case.

Also irrelevant in this case is the definition of "desegregation" in the Civil Rights Act of 1964, 42 U. S. Code 2000c, and cited by petitioners. That definition merely states that "desegregation under that act does* * * not mean the assignment of students to public schools in order to overcome racial imbalance." This in no way indicates or implies that such action under State law is unconstitutional. *Addabbo* v. *Donovan*, 22 A. D. 2d 383 (N. Y. 2nd Dept. 1965).

III

The decision below is correct.

Although this is a brief on the jurisdictional question, I believe a few words of summation will also show that the determinations of the Commissioner and of the Court below were correct.

The laws of the State of New York, as interpreted by its highest Court, give the Commissioner the power to supervise the administration of the public school system by local boards of education. Where such a local board is remiss in an educational matter, and an appeal is brought before the Commissioner, he can order that appropriate action be taken, and his determination is "final and conclusive and not subject to review in any Court or place whatever." New York State Education Law, Section 310. The Court of Appeals has interpreted this statute to mean that the Commissioner's determination cannot be disturbed unless

it is "purely arbitrary". *Matter of Board of Education* v. *Allen*, 6 N. Y. 2d 127; *Balaban* v. *Rubin, supra.*

In this case, after an exhaustive study of the facts in this school district, the Commissioner found that *de facto* segregation existed, and that it was educationally harmful. Although petitioners and others disagree with the latter conclusion, it was in no sense arbitrary, and it represents the trend of judicial thought since this Court found segregated schools inherently unequal in the *Brown* case. Segregated schools have consistently been found to be educationally inferior whether the segregation be *de jure* or *de facto*. *Brown* v. *Board of Education, supra; Blocker* v. *Board of Education, supra; Morean* v. *Board of Education, supra; Barksdale* v. *Springfield School Committee, supra; Balaban* v. *Rubin, supra.*

Having found that the local board refused to act to remove the educational disadvantages of *de facto* segregation, the Commissioner ordered it to proceed in accordance with the attendance plan already discussed. The order and plan have been sustained by the Court of Appeals against the arguments that they were beyond the Commissioner's powers, arbitrary, and illegal. All these assertions, as well as the claims now made that they infringe the petitioner's constitutional rights, are clearly contradicted by both the facts and the law in this case. The petitioners seek to characterize this as a case in which they are denied admission to a school because of their race, and in which an arbitrary racial quota is imposed solely to achieve a desired racial mixture. The facts are very different. Under the plan adopted by the Commissioner the neighborhood school attendance zones which resulted in *de facto* segregation are replaced by more centralized attendance zones for the different grades, but the children can still walk to

school. The assignments are based on the grade pupils attend, and not on their race. The racial population of the district as a whole, and not that of just a small portion thereof, or any arbitrary quota, determines the racial population of each class.

If the harmful effects of *de facto* segregation in a public school system cannot be corrected in this manner, then the educational authorities are powerless to remedy a common failing which both they and the courts have found to be educationally harmful.

CONCLUSION

The decision sought to be appealed is based upon the fact, recognized by this Court since the *Brown* case, that segregated schools are inherently unequal, and on the broad general powers of the Commissioner of Education granted by the laws of the State of New York. Having found that the schools in this particular school district were in fact segregated, as a result of residential patterns, the Commissioner ordered the school district to adopt a reasonable plan to correct the situation. Neither the requirement of the State of New York that *de facto* segregation or racial imbalance be eliminated in this school district, nor the facts of the particular plan by which this is to be done raise any substantial federal question.

For all of the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,

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James E. Allen, Jr. as
Commissioner of Education

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Supreme Court of the United States

No. 246

MICHAEL VETERE, LEWIS HUMMEL and HERMAN ABRAMS,

Petitioners,

v.

JAMES E. ALLEN, JR., Commissioner of Education of the State of New York; BOARD OF EDUCATION OF UNION FREE SCHOOL DISTRICT NO. 12 OF THE TOWN OF HEMPSTEAD, NEW YORK; PATRICIA ANN MITCHELL, ET AL.; and THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE,

Respondents.

REPLY BRIEF OF PETITIONERS

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The within brief is submitted in reply to the briefs submitted by the respondents, Commissioner of Education of the State of New York ("Commissioner"), and Patricia Ann Mitchell, et al. and The National Association for the Advancement of Colored People ("NAACP"), in opposition to the petition for a writ of certiorari.

ARGUMENT

I.

Unless this Court is prepared to countenance the compulsory ethnic dispersement of Jews, Catholics and others on a quota basis, the Commissioner's determination must be overturned.

The opposing briefs of both respondents proceed from the erroneous major premise that "good" racial assignment is quite legal, and is immune from judicial review as a purely local issue; whereas "bad" racial assignment is the only kind which justifies Federal intervention.

Fortunately or unfortunately, we are not without experience in observing the results of such reasoning; its dismal failure is written in broad strokes across the history of the southern United States.

It hardly needs to be added that the Commissioner's directive is in direct violation of the General Statement of Policies issued under Title VI of the Civil Rights Act of 1964, issued by the U.S. Department of Health, Education and Welfare in April, 1965. Such Statement, in Section V(C) thereof, reads in part as follows:

"2. INITIAL ASSIGNMENT. All pupils shall be initially assigned to the school for the geographic attendance zone in which they reside.

"3. ATTENDANCE OUTSIDE ZONE OF RESIDENCE. The rules or practices under which pupils are reassigned or permitted to transfer to a school outside their zone of residence shall not take race, color, or national origin into account.

"4. RIGHT TO ATTEND IN ZONE OF RESIDENCE. At the beginning of any school year any pupil attending a school outside his zone of residence shall have the right to transfer to and attend the school in his zone of residence."

It is of compelling importance to remember that the Commissioner's stated objective is to achieve in the classroom a "balancing" not only of the races, but of the ". . . economic, national, religious or racial background[s] . . ." of pupils in New York State. (Vol. I, pp. 140-141)[1]

Nor can the spectre of a statewide (or nationwide) system of racial, religious and socio-economic quotas be dismissed as a merely academic possibility. Already, the hue and cry for that very practice has commenced.[2] What happens now if a State official decides that too many Jews are living and going to school together—that they are not being properly "assimilated"? What happens if such a State official decides that Jewish children suffer an educational impairment by going to school with too many of their own kind? Or that the superior educational heritage of

[1] Unless otherwise indicated, parenthetical references are to volume and page numbers of the record.

[2] For example, as reported in the New York Times of February 8, 1965 (p. 34 col. 6) a prominent Protestant minister in New York City called for the imposition of racial quotas in housing, and in private as well as public schools. In particular, he attacked the "voluntary self-segregation of Roman Catholics in education and of various ethnic groups in residential patterns. . . ."

the Jews must be shared, by enforced educational association on a quota basis, with their culturally deprived Irish Catholic (or Swedish Protestant) brethren?

Would this Court, in such an event, countenance a "balancing" process whereby the Jews would be involuntarily dispersed throughout the educational community? If not, the Commissioner's present position must be overturned. For this is precisely the power which he has been granted by the Court below.

Nor is it relevant that the Commissioner claims to act from noble motives. His executive displacement of established law, even in the name of doing good, refers us to the dissenting opinion of Mr. Justice Brandeis in *Olmstead* v. *United States*, 277 U.S. 438, at 479:

> "Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning, but without understanding."

II.

Both respondents have conceded that the Commissioner's compulsory "balancing" of the races on a quota basis raises a substantial Federal question.[3]

The contention of the NAACP, that no Federal question exists, is belied by its own chief assertion before the New York State Court of Appeals in the present case:

[3] The controversy over this question continues in the lower Federal courts. Thus in *Wanner* v. *County School Board of Arlington County* (E.D. Va., Civ. No. 3630, decided August 6,

> "Boards of Education have a constitutional duty to eliminate racial imbalance." (See Appendix A to Petition for Certiorari, at page 25).

This is a far cry from what the NAACP told this Court in earlier cases bearing on the present question.

At the first argument of *Brown* v. *Board of Education* in 1952, Robert L. Carter, Esq., was asked by Mr. Justice Black, whether the Kansas Courts' finding, that the segregated Negro schools were not equal to the white schools, referred merely to the community in question, or was a more general finding. Mr. Carter answered:

> "I think I agree that the finding refers to Kansas and to these appellants and to Topeka. Of course, under our theory, you do not have to reach the findings, because we maintain that this is an unconstitutional classification". [21 U. S. Law Week 3163 (Dec. 16, 1952).]

Spotswood Robinson, Esq., in his part of the argument of the South Carolina and Virginia Desegregation decisions in 1953, stated that the purpose of the fourteenth amendment was to prevent the imposition of

> "governmentally cast distinctions, predicated upon race."
> [22 U. S. Law Week 3157 (Dec. 15, 1953).]

Thurgood Marshall, Esq., then summarized the argument of the plaintiffs stating:

1965), the court upheld contentions of White pupils based upon the Federal constitution and the Civil Rights Act of 1964: "The School Board may, if it be so advised, redraw the boundary lines for a school district without regard to race or color, so as to divide the pupils equitably among the existing junior high school buildings in the school system but it may not close an existing neighborhood school primarily for the purpose of mixing the races or creating a better racial balance in the other schools."

> "Our argument is that the state is deprived of any power to make any racial classification in any governmental field."
>
> [22 U. S. Law Week 3159 (Dec. 15, 1953).]

At the final argument of the desegregation decisions, in 1955, when the court was concerned only with the mandate ordering the end of segregation, Thurgood Marshall, Esq., stated:

> "[T]he only thing the court is dealing with is whether race can be used * * *
> What we want is a striking down of race * * *"
>
> [23 U. S. Law Week 3257 (Apr. 19, 1955).]

Similarly, the Commissioner has entertained an opposite view when he deemed it advantageous to do so.

In *Bell* v. *School District No. 6, Town of Babylon,* 77 State Dept. Rep. 37 at 38 (1956), the present New York State Commissioner considered the appeal of a Negro mother in which she contended that the location of a school within the "Negro" section of the school district would, by reason solely of the incidence of Negro population, result in an 80% Negro enrollment; and that such fact would constitute *de facto* segregation. The Commissioner rejected the appeal, stating:

> "Because of the incidence of location, the mere fact that the preponderance of the children who would normally attend the neighborhood school happened to be white or negro, of Polish, Irish, Scotch, Italian or English descent or otherwise or who espouse one religion or another, *does not require a board to attempt to gerrymander the lines, to assign but a certain percentage to a particular school. This would constitute as much discrimination as a gerrymandered line to accomplish the opposite effect.*" (Italics supplied)

It is noteworthy that the above decision was rendered by the Commissioner some two years after the decision of this Court in *Brown* v. *Board of Education*, 347 U.S. 483 (1954). It is also worthy of note that the practice which the Commissioner condemned in his decision in *Bell*, is precisely the practice which he is performing in the present case. For in the present case, he has ordered the abolition of the boundary lines of three attendance areas for the sole purpose of achieving a so-called racial "balance" (Vol. I, pp. 106-116).

How, then, can the Commissioner contend that no Federal question exists in the present case?

May the Commissioner, within a short period of time, promulgate and enforce two exactly opposite policies on a question of such professed importance? And may he do so with complete immunity from judicial review, as he contends? If so, it is time to admit that we have a government not of laws, but of men.

Of course, the Commissioner would have this Court believe that his compulsory "balancing" of the races is being practiced only in the present case, where "unique" geographical factors allegedly exist.

In fact, the Commissioner's directive mandating a compulsive "balancing" of the races, was sent to every school district in New York State (Vol. I, p. 140). And the Commissioner has gone to court repeatedly, and has used the precedent of the present case to defend his imposition of racial quotas, in communities other than the one involved in the present case.

In White Plains, New York:

Cameron v. *Commissioner, et al* (unreported decision of the Supreme Court of Albany County, Index No. 5440/1964. Racial "balancing" in accordance with Commissioner's directive upheld).

In Roosevelt, New York:

Squitieri v. *Commissioner, et al* (unreported decision of the Supreme Court of Albany County, Index No. 2364/1964. Racial "balancing" in accordance with Commissioner's directive upheld).

Thus it is obvious that the Commissioner's plan of enrollment by racial quotas is intended to be employed on a statewide basis.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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